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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEL MAR SANDY LANE ASSOCIATION et al., Plaintiffs, Respondents and Cross-Appellants, v. SAN DIEGUITO RIVER PARK JOINT POWERS AUTHORITY, Defendant, Appellant and Cross-Respondent;	D039324 (San Diego County Super. Ct. No. GIN008705)
SOUTHERN CALIFORNIA EDISON, Real Party in Interest, Appellant and Cross-Respondent.	

Appeal from a judgment of the Superior Court of San Diego County, Lisa Guy-Schall, Judge. Reversed and remanded.

The San Dieguito River Park (Park) is an ambitious concept that contemplates preserving a continuous open space area extending approximately 55 miles from the

source of the San Dieguito River (River) in the mountains near Julian, California to the confluence of the River and the Pacific Ocean in Del Mar, California. The westernmost segment of the Park is planned to be an area of restored coastal wetlands referred to as the San Dieguito River Valley Wetlands Restoration Project (Project), the proposed design for which has evolved over decades of studies, proposals, and negotiations.

The present appeal tests whether the California Environmental Quality Act (CEQA)[1] certification by the San Dieguito River Park Joint Powers Authority (JPA) of the Final Environmental Impact Report (FEIR) for the Project is supported by substantial evidence. The JPA found the FEIR adequately disclosed and analyzed (1) the potentially significant environmental impacts of the Project, (2) feasible mitigation measures for those significant environmental impacts, and (3) project alternatives that could reduce or avoid significant environmental impacts. Accordingly, the JPA certified the FEIR and selected the "Mixed Habitat Alternative" as the design for the Project to be submitted to the California Coastal Commission (CCC) for approval. Del Mar Sandy Lane Association (Owners) filed this action in superior court seeking a writ of mandate to compel the JPA to vacate its certification of the FEIR; Owners' action named Southern California Edison (SCE), the project proponent, as real party in interest.

The trial court upheld some of Owners' challenges, rejected others, and issued a writ of mandate compelling the JPA to vacate its certification of the FEIR. JPA and SCE (together referred to as respondents) appeal those parts of the trial court's ruling finding

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1 Pub. Resources Code, § 21000 et seq.

the FEIR deficient in its analysis of, or mitigation measures for, some of the Project's environmental impacts. Owners cross-appeal that part of the trial court's ruling holding the FEIR's *alternatives analysis* was adequate.

The trial court, in a laudable effort to avoid a mere *rubber stamping* of the JPA's findings, engaged in a conscientious effort to closely examine whether there was substantial credible evidence to support the conclusions of the JPA on the numerous and complex environmental impacts of the Project. Although we commend the trial court for closely *examining* the evidence, it appears that in some instances the trial court's examination metastasized into a *weighing* of the evidence. In this context, we are mindful that a court's role is limited: we may not weigh the evidence, but may ask only whether the administrative record contains evidence from which a reasonable person could have reached the conclusions adopted by the JPA in the FEIR. We hold that because there is substantial credible evidence supporting each of the JPA's conclusions concerning the environmental impacts of the Project and the appropriateness of the mitigation measures, we may not disturb the JPA's certification of the FEIR.

I

FACTUAL CONTEXT

A. The Park

The Park contemplates preserving a continuous open space area extending approximately 55 miles from the source of the River in the mountains near Julian to the terminus of the River at the Pacific Ocean in Del Mar. In the concept plan for the Park adopted by the JPA, and in the Final Program EIR for the Concept Plan (Program EIR)

certified in 1994 by the JPA, the Park was divided into 14 landscape units, one of which was denominated the "Del Mar Coastal Lagoon" unit, which included the lagoon area within the Project.

The Concept Plan endorsed restoring[2] the lagoon and its associated wetlands ecosystem by "enlargement of the existing tidal basin, creation of a variety of coastal wetland habitats, and the restoration of associated upland habitat in order to create a functional ecological and hydrological [unit] that will provide for tidal flushing, open water, wetlands, and grassland and other upland habitat." The Program EIR recognized that restoration was "proposed on both the east and west side of [Interstate highway] 5 [and] [t]his restoration project proposes to permanently open the mouth of the lagoon" and that "[r]estoration of the degraded San Dieguito wetlands would require the creation of an increased tidal prism and increased tidal flows in order to keep the river mouth open most if not all of the time."[3]

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2 We recognize that Owners challenge even the nomenclature employed by respondents to describe the Project. Owners argue the term "restore" is misleading because the historic conditions in the Project area did not include predominantly salt-water lagoons and wetlands principally nourished by tidal influences. Instead, Owners argue, the lagoon was a predominantly freshwater wetlands principally nourished by influxes from the River. Although this "historic conditions" contention is germane to Owners' cross-appeal, for ease of reference we will employ the term "restore" and its conjugations in our recitation of the background of the Project.

3 The Program EIR recognized that a lagoon restoration project could result in significant impacts related to flooding characteristics or channel deepening caused by increased channel scouring, but deferred consideration of mitigation measures for those project-specific impacts to the Project EIR.

B. Evolution of Lagoon Restoration Proposals

The concept of restoring the lagoon and associated wetlands within the Project began long before the JPA was formed or the Park plan was adopted.[4] Prior to the late 1800's, the lagoon was the largest of six coastal lagoons in San Diego County; the earliest maps from 1887 depicted several miles of tidal channels, salt marsh, and mudflats extending from the lagoon's mouth at the ocean to east of the current location of I-5. Studies conducted by the California Coastal Conservancy estimated the marsh area covered over 600 acres and the lagoon covered approximately 1000 acres. However, a number of influences, including development within the lagoon, construction of the Lake Hodges Dam and accelerated erosion, caused the lagoon to fill and change over the following decades. By the early 1940's, the lagoon mouth was closed to the ocean in most years, and the reduced effect of tidal and river influences diminished the vitality of this wetland ecosystem.

As early as 1974, when the City of Del Mar formed the San Dieguito Lagoon Committee to examine the ways and means for revitalizing and managing the lagoon ecosystem, interested parties were studying alternatives for restoring and enhancing the lagoon and surrounding area. By late 1979 that committee had prepared the Lagoon Resource Enhancement Program, the primary purpose of which was to restore and

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4 The JPA was formed in 1989, and the Park Plan was approved in 1994.

enhance the lagoon.[5] During the next decade, numerous governmental agencies and private groups signaled their approval of the goal of restoring the lagoon and its associated habitats.

In the early 1980's, the Wildlife Conservation Board purchased approximately 100 acres (the pilot parcel) within the area covered by the Lagoon Resource Enhancement Program, and various groups funded restoration of the pilot parcel, including dredging open an inlet across the beach to connect the ocean to the river channel, permitting ocean tidal influences to hydrate and flush the pilot parcel. The inlet mouth remained open to the ocean for approximately four years and the tidal basin in the pilot parcel was enlarged to approximately 70 acres. The increased ocean tidal flow revitalized the ecosystem around the pilot parcel and showed the restoration potential for the lagoon. However, the absence of an adequate water flow to scour the inlet mouth caused it to periodically close and remove the pilot parcel from ocean tidal replenishment.

C. The JPA/SCE Symbiosis

Shortly after the JPA was formed in 1989, it approved a conceptual plan featuring a restored wetlands as a component of the Park, and asked the Coastal Conservancy to assist in accomplishing the JPA's goal of acquiring land for restoring the lagoon and surrounding wetlands. The Coastal Conservancy, in its 1990 updated restoration and enhancement plan, reviewed the historic conditions of the lagoon and the factors leading

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5 An early *baseline* study, prepared in 1979, recommended that restoration of the degraded wetlands include tidal flushing as a component of restoration.

to its deterioration, and concluded that the feasibility of restoring the lagoon and surrounding wetlands depended in part on the ability of the JPA to acquire the property and underwrite the extensive research and construction costs necessary to achieve the restoration objectives. One of the specific financing methods identified by the Conservancy was the potential use of wetlands mitigation requirements imposed on developers and others whose projects adversely impacted fish and wildlife.

SCE was a party owing a wetlands mitigation obligation under a permit it received from CCC in 1979 to construct and operate a nuclear power plant.[6] In June 1991, CCC amended SCE's SONGS permit to require that SCE identify a mitigation site and develop a preliminary mitigation plan meeting certain minimum criteria, including the requirements that the site have potential for restoring tidal wetlands with extensive intertidal and subtidal areas, and create or substantially restore 150 acres of wetlands. The CCC identified eight potential sites for potential coastal wetlands restoration, including the lagoon.

D. SCE's Preliminary Studies

SCE began its site selection process in August 1991. By March 1992 the studies conducted by outside experts retained by SCE identified the lagoon as one of the two

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6 In 1974, SCE had received a permit from CCC's predecessor to construct units 2 and 3 of the San Onofre Nuclear Generating Station (SONGS). However, because the potential impacts of SONGS were unknown, the CCC established a Marine Review Committee (MRC) to study the effects of SONGS. After 15 years of research and consultation, the MRC issued its 1989 final report. The report recommended that SCE be required to mitigate the environmental impacts of SONGS's cooling system by restoring 150 acres of wetlands in the Southern California Bight.

most promising sites for implementing a restoration project meeting the CCC criteria. In June 1992 the CCC approved the lagoon as the best site for satisfying the mitigation obligation imposed on SCE. Because the preliminary studies concluded that regular tidal flow was critical to restoration of the lagoon and it was feasible to keep clear an open channel to the ocean to allow regular tidal flow to the lagoon, SCE began assembling a team to design the Project.[7]

E. JPA's Parallel Activities

During the time frame that SCE began formal design review for the Project, the JPA was preparing the overall plan for the Park. By 1990, the JPA had approved a conceptual plan for the Park, as well as a conceptual design for the lagoon restoration, that contemplated extensive lagoons and wetlands in the Project area. By 1994 the JPA adopted the overall Concept Plan for the Park setting forth the goals and objectives of the

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[7] The team of experts retained by SCE to evaluate the feasibility and design of the Project included numerous scientists with impeccable credentials. In the earliest stages of the design process, SCE hired Dr. Howard Chang to analyze river hydrology to ensure the Project design would create an adequate flow to maintain the intertidal channel. Chang, a registered engineer with more than 30 years experience in river hydrology, created the model known as FLUVIAL-12, which is one of two widely used models for analyzing river dynamics in both man-made and natural settings. SCE also retained Dr. Scott Jenkins of Scripps Institution of Oceanography, an expert on coastal processes and tidal sedimentation, to identify local tidal and coastal processes to effect restoration of the lagoon and assist in creating a Project design that would successfully restore the lagoon and wetlands. The SCE team also included Dr. Elwany (another recognized expert on the subject of coastal processes) and Dr. Josselyn (an expert on wetlands habitat preservation).

Park and the overall planning framework for future Park development.[8] In the final environmental impact report for the Concept Plan for the Park, certified by the JPA in early 1994, the JPA's findings included a design mandate for the Project:

> "In association with future wetland restoration and/or enhancement proposals, including restoration of the San Dieguito Lagoon Coastal Wetlands . . . , a thorough analysis of potential impacts to affected properties as a result of alteration of the existing flood flows shall be prepared in association with required environmental review. Adequate mitigation measures shall be incorporated into the scope of such projects to ensure that adverse impacts resulting from the proposed alteration in flood flow are reduced to below a level of significance."

F. The Evolving Project Design

Although the Project did not begin with a blank slate,[9] comprehensive studies for the precise design and engineering for the Project began in earnest starting in 1992. As part of the design process, the team assembled by SCE studied the hydraulic and sedimentary processes of the River, the lagoon and the local beaches, including studies of

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8 The process leading to the Concept Plan included the formation of the San Dieguito Lagoon Wetlands Restoration Project Working Group (Working Group) to solicit public participation in the planning process for the lagoon component of the Park plan. This Working Group was composed of diverse community groups, including homeowners' groups, the Buena Vista Audubon Society, the Lagoon Committee, the Sierra Club, the San Dieguito River Valley Land Conservancy and others. The Working Group met on numerous occasions during 1992 and 1993 and issued draft goals and objectives in the fall of 1993, which were submitted as part of the planning for the Project.

9 Environmental baseline studies completed in 1979 recommended restoration of the degraded wetlands, including tidal flushing; the Conservancy updated that study in 1990; and the pilot parcel had shown the benefits of tidal lagoons.

tidal hydraulics, river bottom and beach profiles, and ocean inlet closure dynamics.[10] The results of these studies were used to formulate more accurate predictive models for analyzing feasible designs for the tidal inlet, the lagoon and the wetlands.

These studies guided the evolution of the design of the Project, and in particular the twin criteria for a Project design that would increase the amount of tidally influenced wetlands without exacerbating the risks of erosion, loss of beach sand, or damages to coastal structures. In Chang's 1993 report, his modeling of flood events predicted that all of the then-contemplated restoration designs would result in a 10 to 20 percent increase in "river scour" of the River bed and banks compared to existing conditions, along with a heavy deposit of sediments in the restored wetlands and impaired sand delivery to the beaches. He attributed those negative impacts to the fact that, under then-contemplated restoration designs, there would be significant dredging of the lagoon and inlet channel and the River's unrestricted flow into newly created water basins could cause sand to settle in the River basins rather than reaching the River mouth for deposit onto the beaches. Jenkins found the sediment budget for beaches south of the River outlet was heavily dependent on sand deposited from the River during flood events, and any reduction of sand transport to the River mouth would have a significant negative impact on beaches south of the River mouth. Accordingly, the earlier designs were jettisoned in

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10 Lagoon hydrology and water quality studies were conducted in 1993, 1994 and 1995. Hydrology and sedimentation studies were completed in 1993, 1994, 1997, 1998, and 1999. Historical inlet closure studies were completed in 1996, and numerous coastal process and inlet channel studies were completed between 1998 and 2000.

favor of designs that moved the inland water basins out of the primary River flow areas and utilized a system of levees (or berms) that separated the tidal basins from the main River channel and channeled River flow to allow continued sand deposits to be delivered to the beaches.

By September 1997 SCE had prepared and submitted for JPA approval a Preliminary Wetlands Restoration Plan (the Preliminary Plan) that provided for construction and maintenance of an open ocean tidal inlet mouth (to ensure tidal flow to the lagoon and adjacent areas), excavation of 139 acres of existing nontidal land to create subtidal and intertidal mudflats and vegetated tidal marshes, and construction of levees along the River to ensure existing River flow and sand transport to the ocean. The Preliminary Plan noted that previous iterations of restoration designs had been subjected to study by Chang and Jenkins; their studies expressed concerns that earlier designs would create river scour, sediment deposition and impaired sand delivery; the designs were therefore modified to use levees to separate the restoration areas from the active River channel flow; and modeling studies showed the modified designs achieved the goals of maintaining existing conditions of River scour and sand movement while avoiding sedimentary deposits into the restored wetlands areas. The Preliminary Plan was presented to the public at an August 1997 Workshop, approved by the JPA's Citizen Advisory Board in September 1997, and approved by the JPA in September 1997.

G. Further Study of the Project Plan

The studies, models and Preliminary Plan were subjected to peer review by various panels of qualified experts. The three scientists selected to review Chang's work

met at a November 1997 Workshop and unanimously approved his use of the FLUVIAL-12 model for analyzing river hydrology and described the Preliminary Plan as "excellent" and "far-sighted." They provided comments on issues raised by the studies, and Chang provided written responses to their questions and concerns. Jenkins's work was similarly peer-reviewed as part of a 1998 workshop, and his models, analyses and conclusions received favorable reviews.[11]

H. The DEIR

A Notice of Preparation for the Project EIR was issued June 1, 1998, and the resulting draft environmental impact report (DEIR) was circulated for review in January 2000.[12] The DEIR recited that the primary purpose of the Project was to restore habitats that historically existed in the area. It recognized the Project was designed to meet the goals of ensuring "adequate tidal and fluvial flushing and circulation with an optimal tidal regime" to support a wetlands ecosystem while "[m]aintain[ing] the integrity of beach and sand balance, such that the [P]roject does not contribute to a net loss of beach sand north or south of the river mouth" and "[m]aintain[ing] existing conditions of . . . scour and sand movement" through the River. The DEIR evaluated five *action* alternatives (in

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11 Owners' appellate claims rely heavily on the fact that these reviewers cautioned about the limits of modeling as a predictive tool. We consider their criticisms in section IV.A., *post*.

12 The DEIR was the result of an extensive "scoping" process. The company that prepared the DEIR independently assimilated years of environmental studies and analyses, including the work performed by the SCE team, and performed supplemental studies to fill data gaps identified during the process of preparing the DEIR.

addition to the *no project* alternative) to evaluate designs for achieving the overall goals for the Project. The *action* alternatives featured a permanently open inlet mouth connecting the lagoon to the ocean, and used berms to increase restoration potential while minimizing scouring and interference with sand delivery to the beach.

I. The Public Comment on and Final Approval of the FEIR

After the DEIR for the Project was released for public comment, public workshops were held, written comments were received and formal responses to comments were prepared. In addition, further studies were conducted to examine the concerns raised during the comment period, and Project design changes were adopted.[13]

In September 2000, after the Project FEIR was released and public hearings held, the JPA selected the "Mixed Habitat" alternative, approved the Project and certified the FEIR. The JPA found the FEIR disclosed and analyzed the potentially significant environmental impacts of the Project, disclosed and analyzed feasible mitigation measures and Project alternatives that could reduce or avoid significant impacts, and

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13 For example, in response to concerns that a permanently open inlet channel to the ocean could cause sand depletion and might increase the risk of flooding in the Sandy Lane development, Chang and Jenkins apparently revisited their modeling studies and remained convinced there would not be a substantial increase in beach erosion as a result of the Project. However, Jenkins did confirm that the existing design for the inlet channel could modestly increase "wave run-up" during minor storm events, although that channel design would have no impact on wave run-up for events beyond the approximately five-year storm events. Chang therefore recommended, as an additional precaution, that the channel be relocated 50 feet farther north to eliminate wave run-up impacts from minor storm events. The FEIR adopted this design change.

found the Project as designed would not cause loss of beach sand, exacerbate flooding or erosion risks, or increase the potential for damage to the Sandy Lane sea wall.

II

TRIAL COURT PROCEEDINGS

Owners filed a Petition for Writ of Mandate challenging the adequacy of the FEIR and sought an order vacating the JPA's certification and requiring revision to the FEIR to address the claims raised in Owners' petition.[14] The trial court found in favor of respondents insofar as Owners claimed the FEIR was deficient in its "alternatives analysis," and Owners' cross-appeal challenging this aspect of the judgment is considered in Part V of this opinion. The trial court found in favor of Owners on a variety of issues and respondents' appeal challenges those aspects of the judgment. The relevant[15] trial court findings challenged by respondents in this appeal are:

> 1. The FEIR did not adequately analyze the "direct impacts to shoreline, including shoreline erosion and sand loss, due to permanent inlet opening," and the JPA's conclusions that there

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14 A separate lawsuit was filed by Citizens United to Save the Beach (CSUB) that asserted several claims connected with the Project FEIR, including the allegation that the Project FEIR violated CEQA. That case was transferred to San Diego, where CSUB intervened in Owners' action and dismissed their separate CEQA claim.

15 The trial court rejected Owners' claims that (1) CEQA was violated because the JPA was "irrevocably committed" to the Project before the Project's impacts had been thoroughly evaluated and (2) the FEIR did not adequately describe the physical and environmental conditions in the vicinity of the Project. Owners' cross-appeal does not expressly challenge these determinations. The trial court also found the FEIR did not adequately analyze the impacts of traffic or the potential impacts caused by the disposal of dredged and excavated soils. Respondents challenged these findings but Owners do not respond to those challenges or pursue those claims in this de novo proceeding.

would be no increased erosion or sand loss caused by permanent inlet opening were not supported by substantial evidence.

2. The mitigation measures concerning pedestrian access, geotechnical impacts, and safety hazards attendant to excavation of an airfield site were inadequate for reasons distinct to each mitigation measure.

3. The FEIR did not adequately analyze the impacts to water quality caused by introducing seawater into the lagoon;

4. The FEIR did not adequately analyze the impacts of the Project caused by excavation and dredging in proximity to leaking underground storage tanks;

5. The FEIR did not adequately analyze potentially significant impacts on long-term maintenance and reliability of public utilities;

6. The FEIR did not adequately analyze or mitigate the impacts to biological resources caused by the removal of existing habitat to create new habitat, the time delay between removal and disturbance of old habitat and the maturation of new habitat, or the impingent of trails into sensitive areas.

Accordingly, the trial court found the JPA abused its discretion by certifying the FEIR, ordered the JPA to vacate its certification of the FEIR and all related approvals, and remanded the matter to the JPA with directions to comply with CEQA's requirements.

III

GOVERNING STANDARDS

A. Standards for an EIR

The CEQA process is intended to protect the environment by compelling the government "first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through

the selection of feasible alternatives. It permits government agencies to approve projects that have an environmentally deleterious effect, but also requires them to justify those choices in light of specific social or economic conditions." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1233.)

" 'CEQA is essentially an environmental full disclosure statute' " (*Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186), and the EIR "is ' "the heart of CEQA" ' and the 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' " (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1229.) "The Legislature has made clear that an EIR is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' [Citations.] [¶] Under CEQA, the public is notified that a draft EIR is being prepared [citations], and the draft EIR is evaluated in light of comments received. [Citations.] The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised in the review process. [Citations.] The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project. [Citation.] Before approving the project, the agency must also find either that the project's significant environmental effects identified in the EIR have

been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits. [Citations.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390-391 (*Laurel Heights I*), fns. omitted.)

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Laurel Heights I*, 47 Cal.3d at p. 390.) The EIR, in addition to being an environmental alarm bell, is "also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." (*Id*. at p. 392.)

CEQA requires an EIR to reflect a good faith effort at full disclosure, but "it does not mandate perfection, nor does it require an analysis to be exhaustive." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (*Dry Creek*).) Thus, "[t]he absence of information in an EIR does not per se constitute a prejudicial abuse of discretion." (*Ibid*.) An EIR need contain only a "sufficient degree of analysis to provide decisionmakers with information [that] enables them to make a decision [that] intelligently takes account of environmental consequences." (Cal. Code Regs., tit. 14,

§ 15151, CEQA Guidelines.)[16] Error occurs if the "failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Dry Creek, supra*, at p. 26; see also *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs*. (2001) 91 Cal.App.4th 1344, 1355 (*Berkeley*).)

B. Standards for Judicial Review

An EIR is presumed adequate (Pub. Resources Code, § 21167.3), and a court's review of an agency's action under CEQA " 'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' " (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goleta Valley II)*; see also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 568 (*WSPA*).) On appeal, we accord no deference to the trial court's decision because our review of the agency's decision is de novo, and we apply standards identical to those applied by the trial court to evaluate the sufficiency of the evidence to support the agency determination. (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320-1321; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 905.)

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16 All references to the California Code of Regulations are to the CEQA Guidelines, hereafter Guidelines.

Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) Whether a fair argument can be made "is to be determined by examining the whole record before the lead agency." (*Ibid*.) Substantial evidence is provided by facts, reasonable assumptions predicated on facts, and expert opinions supported by facts, but is not provided by argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly erroneous or inaccurate. (*Id*. at subd. (a), (b).)

Under the applicable standards, a reviewing court " 'does not pass [on] the correctness of the EIR's environmental conclusions, but only [on] its sufficiency as an informative document.' [Citation.]" (*Laurel Heights I, supra,* 47 Cal.3d at p. 392.) We must resolve reasonable doubts in favor of the agency's findings, and may not reweigh conflicting evidence to determine who had the better argument. (*Berkeley, supra*, 91 Cal.App.4th at 1356.) Accordingly, even if a court believes an opposite conclusion would have been more reasonable, we may not set aside an agency's approval of an EIR if the agency's findings have substantial evidentiary support. (*WSPA*, *supra*, 9 Cal.4th at 572; accord, *Goleta Valley II, supra*, 52 Cal.3d at p. 564.)

IV

ANALYSIS OF ISSUES ON RESPONDENTS' APPEAL

A. The Beach Sand Loss Issue

The JPA found, and the FEIR concluded, that the Project's design would not cause a significant impact on beach sand depletion along the Del Mar beaches. These findings

and conclusions were based on the extensive scientific studies of the Project's design conducted by Chang (concerning the River hydrology) and Jenkins (concerning the coastal processes), whose studies, models and conclusions were subjected to scrutiny by experts who participated in the peer review process. Owners implicitly recognize that these studies, standing alone, provide substantial evidence for the FEIR's conclusions concerning the beach sand depletion issue. Owners argue, however, the FEIR was nevertheless inadequate on this issue because the studies and conclusions by Jenkins and Chang were based on predictive modeling, and the FEIR did not disclose that the peer reviewers cautioned that (1) predictive modeling is an imperfect art and unpredicted impacts are possible and (2) a beach sand monitoring program, coupled with a commitment to take corrective action to ameliorate future unforeseen impacts, was necessary.

Owners argue the FEIR's omission of these cautionary comments creates three interrelated CEQA violations with respect to the beach sand loss impact of the Project. First, Owners argue the absence of these cautionary comments made the DEIR and FEIR inadequate as informational documents. Second, Owners argue that because the JPA's responses to comments by agencies and individuals regarding the beach sand loss issue were principally predicated on the conclusions of these unreliable studies, the responses were themselves unsupported by substantial evidence. Third, Owners argue that because beach sand loss remained a potential impact of the Project, the JPA violated CEQA by not imposing as a mitigation measure a requirement to monitor beach sand loss and to commit to take corrective action in the event of beach sand loss in the future.

We conclude Owners' contentions are based on the erroneous factual premise that the peer review of Jenkins and Chang's analysis undermined their conclusions and required beach sand loss monitoring and replenishment. Because the erroneous factual premise undermines Owners' legal claims, we are not persuaded by Owners' three claims of inadequacy as to the FEIR's conclusions and JPA's findings on the beach sand loss issue.

The Factual Premise

We have independently examined the peer reviewers' comments and find nothing that undermines the conclusions reached by Jenkins and Chang with regard to the *impact* of the Project design *on beach sand loss*. Although the peer reviewers, as well as Chang and Jenkins, recognized that modeling could not precisely forecast the extent to which the Project would be "self-maintaining" or the extent to which periodic intervention would be required to maintain the lagoonal system, the peer reviewers did not attack the models employed or the central conclusion that the Project lagoonal system, incorporating an open inlet from the lagoon to the ocean and a channelized river flow for delivering sediment to the beaches, poses no significant decrease in beach sand replenishment for (or significant increase in forces operating to erode) the Del Mar beaches.

Two aspects of Jenkins's work, as reported in his January 1998 "Analysis of Coastal Processes Effects," are relevant: (1) his analysis of the amount of sand available for replenishing Del Mar's beaches (the sediment budget); and, (2) his analysis of the tidal transport of sand. Regarding the sediment budget issue, Jenkins noted (in simplified terms) that the Del Mar beach is a barrier sand spit depending on continual resupply of

sand lost by erosion from wave action, and there are two principal sources of resupply: sand migrating along the coast from north to the south within the Oceanside Littoral Cell (the littoral drift) and new sedimentary deposits carried to the ocean by the River. However, sand within the Oceanside Littoral Cell (and especially the area immediately updrift from Del Mar) is in short supply and beaches updrift from Del Mar have suffered dramatic erosion and denuding. In addition, the same littoral drift that delivers sand to Del Mar beaches from the north also carries sand away from Del Mar beaches in a southerly direction. Accordingly, Jenkins identified the River as the primary local source of sediment for replenishing Del Mar's eroding beach, and therefore concluded that any design for the Project that reduced sediment deliveries from the River would negatively impact Del Mar's beach sand.

Jenkins also evaluated tidal and wave transport of sand into the proposed open inlet channel to the ocean. He concluded that, even under the Project design, prevailing tide and wave action would cause a slow accumulation of sand in the inlet because the tidal prism would generate only "one half to two thirds of what would be needed to keep the ocean inlet open indefinitely without mechanical intervention, given the average incident wave power of this particular littoral setting." Accordingly, Jenkins recommended the Project include a component for annually dredging the inlet channel to keep the inlet open to preserve the tidal prism for the Project and provided estimates of the annual volume of dredging that would be required.

During a February 1998 workshop, three scientists (Drs. Goodwin, Mehta and Komar) conducted a peer review of Jenkins's 1998 analysis of the coastal processes

impacts of the Project. Owners assert that all three reviewers opined modeling of coastal processes is inevitably an imperfect science that provides no basis for definitively concluding the Project would not exacerbate beach erosion, and therefore a beach sand monitoring program coupled with a commitment to take corrective action to cure unpredicted impacts to beach sand loss was an essential component of the Project. We have independently examined the peer reviewers' comments without discerning any critique of Jenkins's conclusions regarding the sediment budget in general, the specific importance of the River to sediment delivery to the Del Mar beaches, or his conclusion that Project should be designed to preserve sediment deliveries from the River to the beaches. Moreover, the reviewers did not assert that Jenkins's modeling of sediment delivery through tidal hydraulics or tidal induced sediment transport was so flawed it undermined his conclusions concerning the impact of the Project on sediment deliveries to the Del Mar beaches.[17] Owners rely heavily on Mehta's comment that sediment transport is "one of the most difficult subject areas in coastal and river hydraulics as far

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17 Goodwin, a hydrologist, deferred any in-depth comment on Jenkins's sedimentary budget analysis as outside Goodwin's area of expertise, although Goodwin commented that Jenkins's analysis and experience made his study "the best predictions that can be achieved." In response to SCE's specific question regarding impacts from the project on down-coast areas, Goodwin stated, "Considerable care has been taken in the design to ensure that the delivery of sediment to the inlet channel and beach has not been significantly changed or interrupted. The detailed modeling undertaken by . . . Chang has shown that the sediment delivery to the inlet channel will not be altered significantly by the proposed project." Komar agreed with Jenkins's analysis that the River is the most local significant source of sand and any design that entrapped sand in the restoration area would harm beach supplies. Komar complimented Jenkins's analysis in many respects, including the analysis of sand transport through the inlet and the recharge movement of sand back into the lagoon following river floods that flush sand out onto the beach.

as prediction is concerned." However, Mehta followed that disclaimer by stating, "To the extent that this can be handled, the report presents a good analysis of episodic forcing due to waves and flooding, and the corresponding response of the beaches. . . . I tend to believe the report arrives at correct conclusions concerning sediment deficits for the Del Mar shores." He then concluded, "The beach sediment modeling effort is well done, and I do not see the need for any further field or modeling work of a major nature; it is unlikely to be fruitful, given the uncertainties in forcing and response. The conclusions from this part of the work clearly support the need for the [current design of the Project]."[18]

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18 Owners argue Goodwin provided the most "comprehensive criticism" of Jenkins's modeling efforts because Goodwin questioned the appropriateness of the specific tidal hydrodynamic model used by Jenkins and recommended use of other models with more established track records. Our review of Goodwin's comments reveal that this critique did not question the models used for analyzing the sand yield impacts on the Del Mar beaches, because Goodwin opined that in regard to the sand yield impacts, "the combination of the detailed analyses, the vast personal experience and professional intuition represents the best predictions that can be achieved" and that the study "appears to be thorough." Instead, it appears Goodwin's questions as to the selected model was whether the tidal hydrodynamic model, used by Jenkins in Part 2 of his report, was appropriate because the hydrodynamic model had been developed for flows in large tidal embayments that do not have extensive intertidal regions, and Goodwin suggested it might be more appropriate to use a model developed for tidal marsh systems. Although Goodwin's questions concerning use of the tidal hydrodynamic model might have been relevant to Jenkins's conclusions as to the tidal prism that would be achieved for the restored wetlands, it does not appear to question Jenkins's conclusions as to sand transport or impacts of the Project; to the contrary, Goodwin did not question the models used in Part I of Jenkins's report dealing with sand yields impacts, and instead opined the design seeks to ensure that delivery of sediment to the beach "has not been significantly changed or interrupted" and that Chang's studies have "shown that the sediment delivery to the inlet channel will not be altered significantly by the proposed project."

Thus, the reviewers were specifically asked to address the impact of the Project on down-coast areas, and none expressed concern that Jenkins's conclusion concerning sediment deliveries to the inlet, or the impact of this Project on coastal processes, was flawed or unreliable.[19] Although Mehta did state that coastal processes can produce "unforecasted damages," we have found nothing in his report suggesting that the open inlet channel or any other design aspect of this Project could produce unforecasted depletions in the amount of sand being deposited on the Del Mar beaches.

The peer review of Chang's analysis of the Project design, which evaluated the proper design to maintain sediment deliveries to the beach, similarly contained nothing to undermine or question the conclusion he reached concerning the impact of the Project design on sediment delivery. Chang concluded that designing the Project to separate the newly created tidal basins from the main River flow, using berms to direct heavy River flows carrying sediments to the beaches, would maintain or even improve current rates of sediment deliveries to the beaches. Goodwin and Drs. Nordin and Dunne, the three

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19 Mehta did opine that, given the uncertainties of coastal processes modeling, "there is really no way of knowing exactly how the mouth will behave with regard to blockage/opening by sand and water flow," although Mehta opined that Jenkins's analysis "goes as far as one can in this sense as far as prediction is concerned." Mehta concluded that, given *these* uncertainties, further studies would not be fruitful "from a management perspective" and that the report "wisely avoids making quantitative predictions about the expected frequency of dredging." In summary, it appears Mehta and the other peer reviewers agreed with Jenkins's assessment that sand would continue being pushed to the inlet, and the debate over modeling uncertainties concerned the rate at which sand accumulations would need to be dredged to maintain the desired tidal prism and health of the lagoonal system, *not* the conclusions regarding the Project's impact on beach sand loss.

scientists selected to review Chang's work, met at a November 1997 workshop, unanimously approved his use of the FLUVIAL-12 model for analyzing river hydrology, and expressed agreement with Chang's conclusions that the design of the Project would not significantly alter delivery of sediments to the inlet channel.

Thus, our independent examination of the peer reviewers' comments disclosed nothing that undermines or questions the conclusions reached by Jenkins and Chang on the impact of the Project design on beach sand loss. Instead, the consensus conclusion, which was restated in the FEIR and adopted by the JPA, was that the design of the Project to incorporate an open inlet to the ocean and to use berms to channel River flow to maintain existing levels of sediment delivery to the beaches posed no significant decrease in sand deliveries to, or any significant increase in forces eroding, the Del Mar beaches.

The Informational Role of the FEIR

Owners emphasize that the EIR serves as an informational document that fosters intelligent decision-making and an agency must find out *and disclose* all that it reasonably can about the environmental impacts of a project. (Guidelines §§15144, 15003, subd. (g); *Berkeley, supra*, 91 Cal.App.4th at p. 1356.) An EIR that reaches conclusions concerning the impact of the project in reliance on scientific data, but conceals the existence of other scientific data that directly contradicts its conclusions, is inadequate as an informational document. (*Berkeley, supra*, at pp. 1355-1356; accord, *Sierra Club v. Bosworth* (N.D. Cal. 2002) 199 F.Supp.2d 971, 979-981 [EIS may not ignore body of scientific literature directly contradicting conclusions of experts relied on

by lead agency]; *Seattle Audubon Society v. Lyons* (W.D. Wash. 1994) 871 F.Supp. 1291 [EIS is adequate when it addresses concerns of dissenting scientists].) Owners argue the FEIR offends these principles because it does not disclose the peer reviewers' dissenting views on the Project's impact on beach sand loss, and the FEIR must therefore be revised to incorporate a discussion of those views.

However, the peer reviewers only generically commented on the limits of predictive modeling and were of the opinion that, given these limits, the Project should incorporate measures to monitor the channel and lagoonal system to determine the timing and extent of channel and inlet maintenance. They did not dissent from the central conclusions that the impact of the Project's design features, including the open inlet and the use of berms to channel sufficient river flow to maintain sediment delivery, would not significantly decrease sand deliveries to the Del Mar beaches or exacerbate the forces operating to erode the Del Mar beaches.[20]

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[20] Owners' reliance on *Berkeley* is therefore unhelpful. In *Berkeley*, the petitioner argued the EIR did not adequately evaluate the impact of toxic air contaminants (TAC's). The EIR relied on a 1991 version of a profile, promulgated by the California Air Resources Board (CARB), to estimate the impact of TAC's and, when the lead agency was criticized for not using a more recent profile, the lead agency asserted the newer profile had not been published and CARB staff expressed concern over the accuracy of the newer profile. However, the evidence showed CARB *did* view the new profile as more accurate, and the court held that an EIR may not peremptorily ignore (and then mischaracterize) the opinions of experts (particularly those with the greatest expertise on the particular impact in question) that undercut the EIR's conclusions. (*Berkeley, supra,* 91 Cal.App.4th at pp. 1364-1367 and fn. 13.) Here, the level of expertise possessed by Jenkins and Chang is unquestioned, and the peer reviewers did not contradict their views on the *impacts* of the Project. Although the FEIR did not disclose that *modeling* is not a perfect predictor of the behavior of natural systems, the issue is not "whether the studies are irrefutable or whether they could have been better" (*Laurel Heights I, supra*, 47

The Responses to Comments

Owners argue the FEIR is inadequate because its responses to comments from public agencies and private individuals were conclusory and lacked factual support. We conclude that the JPA responded to all comments raising significant environmental impact issues, and the responses evidenced a good faith reasoned analysis in response to the comments and questions raised, and therefore the requirements of CEQA were satisfied.[21]

Owners argue the JPA's response to the comments by City of Del Mar, the San Dieguito Lagoon Committee, and the Playa Del Mar Townhome Complex were inadequate. However, those comments expressed only a generalized concern that the Project's open inlet to the ocean posed a danger of sand erosion both north and south of

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Cal.3d at p. 409), and the absence of a discussion of the limits of modeling does not necessarily render the FEIR inadequate. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 749.) Instead, the " 'sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. . . .' [Citations.] Technical perfection is not required; the courts have looked not for an exhaustive analysis but for adequacy, completeness and a good-faith effort at full disclosure." (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 368, fn. omitted.) The FEIR cited and properly relied on extensive studies, as peer reviewed and refined following such review, that concluded the Project would not exacerbate beach sand loss. The FEIR adequately fulfilled its informational role.

[21] After the draft EIR is completed, a comment period is provided for the public and interested agencies. (Guidelines, §§ 15085, 15086, 15087.) In the course of preparing a final EIR, the lead agency must evaluate and respond to comments relating to significant environmental issues. (Pub. Resources Code, § 21092.5, subd. (a); Guidelines, §§ 15088, 15132, subds. (b)-(d).) "There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice." (Guidelines, § 15088, subd. (b).)

the River mouth, and asserted that the beaches should therefore be monitored for erosion and problems corrected when they occurred. The JPA responded to the comments with explanations of the basis for its conclusion that the Project would not cause beach erosion or sand loss, citing the original studies and updated information from Jenkins. Owners argue that the gist of respondents' response--that the designed river inlet mouth would not have a deleterious impact on the down coast beach and the Project had no negative impact on sediment delivery to the beaches--was inadequate for two reasons: first, the responses were conclusory; second, the responses were unsupported by any evidence because they were based on modeling predictions the experts agreed were unreliable. Although conclusory statements unsupported by factual information are insufficient (Guidelines, § 15088, subd. (b)), the studies by Jenkins and Chang addressed the design features and provided factual support for the responses. Because the peer review experts did not dissent from the reliability of the studies insofar as the studies evaluated the Project design impacts on erosion and sediment delivery, the responses were supported by substantial evidence.

Owners next assert the JPA's responses to the comments of Rick Engineering (RE) were inadequate. RE commented that it had observed the lagoon mouth "for years and noted that when the mouth is open the south lying beach recedes."[22] RE's analysis

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22 RE attempted to buttress its conclusion by attaching a series of photographs showing an open lagoon mouth and substantially eroded conditions on the southerly beaches. However, Jenkins explained that the photographs were irrelevant because they "*confused* beach effects due to *river floods* vs those due to *tidal exchange*." (Italics added.) Jenkins noted that all of the photographs showing an open lagoon mouth had

attributed this loss to its opinion that, when the inlet is closed, the littoral drift delivers sand from the north without interruption but, when the inlet is open, the outflow from the River mouth creates a current that blocks the sand and forces it seaward, thereby preventing accumulation of sand in the areas south of the River mouth. However, in response to RE's claim, Jenkins explained that RE's conclusion was flawed. First, RE's "observational" data that an open lagoon inlet mouth is accompanied by receding south-lying beaches was contradicted by historical measurements, conducted by the United States Army Corp of Engineers, showing that between 1980 and 1989 the lagoon mouth was open nearly 75 percent of the time but the beach south of the lagoon did *not* recede.[23] Second, Jenkins explained that RE's *analysis* of the impact on littoral drift of an open lagoon mouth on south lying beaches ignored important dynamics impacting

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been taken shortly after major flood events, and the loss of beach depicted in the photographs was the direct effect of the scouring accompanying extreme river flooding and/or heavy surf events. Jenkins stated that "[b]ecause of these significant and overwhelming events . . . , those photos do not support the assertion that *daily tidal exchange resulting from this project* will cause anything like the features shown in the photographs." (Italics added.)

[23] Indeed, Jenkins noted the beach south of the inlet actually increased during this period when the inlet was open a majority of the time, even though the general trend during this same period for areas south of the Oceanside Harbor jetty (which arrests sand drifts from the northern portion of the Oceanside littoral cell) showed a receding beach. Although Owners quibble with the methodology employed by Jenkins to determine the percentage of the time the lagoon mouth was in fact *open* during this decade, it is not the role of a court to reassess the scope or methodology employed or the accuracy or reliability of the data relied on by the agency, but only to decide whether the conclusions are supported by substantial evidence. (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259.) Under this deferential standard, there is substantial evidence to support Jenkins's response that RE's observational data is contrary to historical data.

littoral drift through and around the mouth of tidal lagoons.[24] The response to RE's comment thus presented a good faith, reasoned analysis supported by factual information, and therefore complied with the requirements of CEQA. (Guidelines, § 15088, subd. (b).)

Feasible Mitigation Measures

Owners argue that because the experts unanimously agreed beach sand loss was a potential impact of the Project and the Project should therefore include measures to monitor for and mitigate beach sand loss, the JPA violated CEQA when it did not impose as a mitigation measure the requirement to monitor beach sand loss and to commit to take future corrective action for beach sand loss.[25] As previously discussed, our independent review of the Jenkins and Chang studies, and the peer reviewers' critique of those studies, do not support Owners' claim that the experts unanimously agreed sand loss was a potential impact *of the Project*. Accordingly, the JPA's finding that beach sand loss was

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24 Jenkins's response attached a diagram showing transport pathways for a tidal inlet. He explained that a portion of the sand being transported by the littoral drift flows into and then back out of the opening as the tide ebbs and flows, but the majority of littoral drift entirely bypasses the inlet by flowing over the ebb tidal bar, and therefore the RE analysis was "flawed from the standpoint of transport mechanics because [RE] failed to recognize the presence and function of ebb tidal bars at the mouth of any tidal lagoon."

25 It is undisputed that, when the lead agency finds a proposed project creates a significant impact, the agency may approve the project if it imposes mitigation measures necessary to reduce this impact to a level below significance. (Guidelines, §§ 15126.4, 15091, subd. (a).) However, CEQA's requirements apply only to impacts from changes caused by a project, not to impacts from preexisting conditions that are not exacerbated by the project. (*Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468.)

not a significant impact of the Project and its consequent omission of mitigation measures for this nonexistent impact was proper.[26]

B. The Biological Resources Issue

The Project, which is driven by the central purpose of creating new, or rehabilitating degraded, coastal tidal wetlands, includes existing habitat for certain rare or endangered species. The FEIR gave in-depth consideration to the impact the Project would have on these species, and the JPA concluded that converting the habitat from its existing condition to a coastal tidal wetlands habitat would either have no impact on or would in fact benefit the endangered species found within the Project area.

Owners argue that, even assuming the evidence supports the conclusion that the newly created or restored habitat would benefit endangered species after the new habitat *matured*, the FEIR contained no estimate of when the new habitat would be sufficiently mature to sustain these biological resources. Owners argue that without a time projection, the FEIR could not assess the potential impacts on these species *during* the habitat maturation period or whether the long-term benefits would *mitigate* the

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[26] Owners rely heavily on the discussion by the experts, including Jenkins and Chang, that because the modeling could not precisely predict the extent to which natural forces would be adequate to self-maintain the inlet opening essential to maintaining the tidal prism for the Project, it would be necessary to monitor the Project to evaluate whether and when to maintain the channel (and other features of the Project design) to ensure a healthy wetlands. This aspect *was* included in the FEIR. However, we reject Owners' effort to transmogrify the experts' recommendation to impose a maintenance obligation *for* the Project into an obligation to monitor and maintain areas *adjacent to* but unimpacted by the Project.

detrimental effects on these species suffered during the maturation period.[27] Owners also argue that, without a time frame for maturity of the new habitat, there is insufficient evidence to support the JPA's alternative finding that, if the impact on endangered species was significant, the benefits of the Project, including the long-term biological benefits of a restored tidal wetlands system, override any short term losses caused by implementation of the Project.

However, the FEIR acknowledged and evaluated this issue. The FEIR recognized the Project area, even in its degraded condition, contained some habitat values that would be altered during the restoration process. In conjunction with its discussion of the biological resources issue, the FEIR also recognized there would be a time lag to accomplish the conversion into and the recolonization of the new habitat:

> "With the creation of significantly more tidal and transitional marsh and mudflat habitat, recolonization and immigration into the new areas would begin within a short time frame ([less than] 1 year) and the area as a whole would ultimately support more diverse communities, <u>although this process would occur more slowly in the upper intertidal and transition areas</u>." (Original underscoring.)

The FEIR then concluded that "the residual short-term adverse impact associated with the time lag between the impact on existing seasonal wetlands and the creation of

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[27] The Owners contend the FEIR did not consider the impacts *of the construction process* or methods of mitigating those impacts. However, the FEIR recognized the Beldings savannah sparrow (an endangered species) occupied some seasonal saltmarsh that would be disturbed as part of the construction process, but concluded that impact could be mitigated to a level below significance by avoiding occupied habitat during breeding season, and the expanded saltmarsh habitat created by the Project would provide benefits for the species that more than compensated for any short-term impacts associated with the disruptions from construction.

new habitats that provide equivalent functions and values is considered less than significant . . . ." Owners argue that this analysis and discussion is inadequate, and therefore the JPA's findings are not supported by substantial evidence: there is no estimate of when the habitat will be fully mature for purposes of supporting more diverse communities, and no explanation of what is meant by "begin" the recolonization.

However, the FEIR *does* discuss the estimated time necessary for the new vegetation to become established, albeit in a different context.[28] More importantly, Owners' argument imposes a level of technical detail that is not required. CEQA requires an EIR reflect a good faith effort at full disclosure; "it does not mandate perfection, nor does it require an analysis to be exhaustive." (*Dry Creek, supra,* 70 Cal.App.4th at p. 26.) The FEIR did not ignore the issue of the time lag, but instead acknowledged the issue, provided a good faith analysis of the issue, and incorporated feasible mitigation measures where appropriate to minimize known impacts. The FEIR's analysis was adequate, and the JPA's findings of no significant impact on biological resources were supported by substantial evidence.

C. The Geological Impacts Issue

The FEIR, relying on extensive evaluations of the geological conditions within the Project by two different geotechnical companies, concluded that seismically-induced shaking could result in (1) liquefaction of the upper 25 feet of sediments, which could

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28 The FEIR, discussing the impacts of the excavation and restoration process, estimated that "newly planted vegetation would take between one and two years to become sufficiently established to minimize visual impacts."

cause differential settlement of the ground surfaces; and (2) a potential for "lateral spreading" of up to 2 1/2 to 3 feet on the I-5 freeway embankments adjacent to areas W-1, W-6a and W-6 (partially due to excavations in those areas) and up to one foot in the some locations within the wetlands areas.[29] Owners argue the FEIR violates CEQA by deferring the identification, analysis and selection of the specific measures to be employed to mitigate these two impacts. Owners cite that portion of the FEIR that specifies a geotechnical consultant would be retained to evaluate appropriate measures for stabilizing the I-5 embankment and the "specific measure to be implemented shall be reviewed and approved by the CITY Engineer as well as Caltrans, District 11 [and] [t]he approved measures shall then be made conditions of" the development permit. Owners argue the FEIR is inadequate because it defers analysis and selection of mitigation measures or delegates that responsibility to other agencies.

As a preliminary matter, the FEIR did not defer the analysis and selection of measures *to protect the newly constructed berms* from the dangers posed by liquefaction

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29 The 1999 report, discussing the potential for lateral spreading, noted the "subsurface evaluation indicate[s] that the earth materials are highly variable. Evaluating the potential for lateral spreading at selected locations, our analysis indicates that lateral spreading may range from negligible in boring LG-9 to up to one foot in boring LG-10. Lateral spreading of the proposed lagoons east of I-5 is not considered to be significantly greater than the potential for lateral spreading in the existing conditions. [¶] After construction of the lagoon area, with the lagoon slopes and the lagoon depth as presently planned, the design seismic event could cause lateral spreading of the slope areas near I-5 . . . . There are methods to mitigate this horizontal movement. These methods include: . . . densification of the subsurface soil by dynamic compaction; [and] construction of stone columns near the I-5 embankment. Other mitigation methods are available and could be evaluated."

caused by a seismic event. The experts identified soil liquefaction as a potentially significant impact to newly constructed berms and recommended site-specific geotechnical evaluations be performed in areas planned to receive fill soils, subsurface conditions be evaluated in the field during construction, compacted fill and backfill soils be tested for specified compaction (with any site-specific areas of soft, saturated or otherwise unsuitable subgrade soils being removed to competent material as evaluated in the field during construction), and the fill to be used be suitable and compacted according to set standards. The FEIR adopted the expert's recommendations for guarding against the potential for seismic liquefaction of the new berms.[30] Thus, insofar as the experts identified and analyzed geological concerns about the stability of the berms, there was no *deferral* of the adoption of mitigation measures to protect the berms; instead, the FEIR stated and the JPA adopted a series of articulated standards with which the Project must comply to protect the berms against liquefaction damage.

Insofar as the geological evaluation identified lateral spreading near the I-5 embankment as a potential Project impact, the FEIR concluded this potential impact would be mitigated by requiring a geotechnical consultant be hired to evaluate measures, including but not limited to dynamic compaction of the soil or use of stone columns, for mitigating the potential for lateral spread of the I-5 embankment, *and* that the "specific

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30 The FEIR specified that "[s]ite-specific geotechnical evaluations shall be completed in areas proposed to receive fills (e.g., berm areas . . . .)"; fill areas be excavated until "competent materials are encountered," and compaction testing of the areas be completed for berm areas; and fill materials be drained and compacted to specified standards.

measure to be implemented" be reviewed and approved by both the City Engineer and Caltrans, *and* that implementation of that specific measure be made a condition of the development permit. Owners argue the FEIR does not comply with CEQA by deferring the evaluation of a mitigation measure and/or by delegating to other agencies the responsibility for ensuring that identified environmental impacts be mitigated.

Under CEQA, feasible mitigation measures must be identified for each significant Project impact. (Guidelines § 15126.4.) Several courts have ruled that a lead agency errs when it approves a project, without any identified mitigation measures for known impacts of the project, based on a condition that mitigation measures be developed and approved at some future date. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-311 (*Sundstrom*); *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396-1397.) Owners assert that under the rationale of *Sundstrom*, the FEIR here was inadequate because it did not impose identified mitigation measures to prevent lateral spreading along I-5 but merely commissioned a search for solutions.

Although the formulation of mitigation measures "should not be deferred until some future time," CEQA's Guidelines permit mitigation measures to "specify performance standards [that] would mitigate the significant effect of the project and [that] may be accomplished in more than one specified way." (Guidelines § 15126.4, subd. (a)(1)(B).) The present FEIR satisfies those standards under the rationale of *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1450. In *Riverwatch*, the EIR identified the impacts of a road widening and realignment (an essential predicate to the project) as a significant impact but found the impact mitigable if certain protective

devices were constructed "to the satisfaction of the Department of Public Works and Caltrans," and stated that further studies would be required to determine whether additional mitigating structures might be required. (*Id*. at p. 1446.) Moreover, noted *Riverwatch*, "no part of the project will go forward until the realignment has been approved by Caltrans and the road has been constructed," and the lead agency was entitled to rely on this as an additional safeguard. (*Id*. at 1450.) In rejecting the opponent's argument that this improperly deferred evaluation and imposition of mitigation measures, *Riverwatch* stated:

> "Contrary to Riverwatch's contention, the fact the final EIR deferred until a later point more detailed analysis of the realignment of SR 76 did not violate CEQA. ' "[T]he extent to which treatment of a subject in an [environmental document] for a multistage project may be deferred, depends on two factors: (1) whether obtaining more detailed useful information on the topic . . . is 'meaningfully possible' at the time when the [environmental document] for an earlier stage is prepared, [citation], and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project [citation]. [¶] If the additional information would at best amount to speculation as to future event or events, it obviously would not be of much use as input in deciding whether to proceed. . . . Where the major . . . action under consideration, once authorized, cannot be modified or changed, it may be essential to obtain such information as is available, speculative or not, for whatever it may be worth in deciding whether to make the crystalized commitment . . . . But where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available and incorporated in a further [environmental document], it cannot be said that deferment violates the 'rule of reason.' Indeed in considering a project of such flexibility, it might be both unwise and unfair not to postpone the decision regarding the next stage until more accurate data is at hand." [Citation.]' " (*Riverwatch, supra,* 76 Cal.App.4th at p. 1448,

quoting *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 236-237.)

The same rationale applies here. Unlike *Sundstrom* and its progeny, in which the deferral appeared likely to create the situation where "mitigation delayed is mitigation denied,"[31] there was substantial evidence to support the JPA's action here because the experts identified at least two feasible methods that *would* mitigate the lateral spreading problem, and the only deferred issue was *which* of those methods (or some other equally efficacious method) would be approved by Caltrans. As the *Riverwatch* court reasoned:

> "Admittedly, where as here deferral is essentially a matter of practicality and efficiency, rather than actual impossibility, the validity of a deferred approach will depend a great deal upon the significance of the information which would be developed later. [Citation.] As we have noted, the information that was available permitted the county to conclude the widening would have a significant but mitigable impact on the floodplain and that an alternative route was not acceptable. Although we agree the additional Caltrans data and HEC-2 modeling would be of considerable assistance in designing the precise contours of the

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31 For example, in *Sundstrom,* the court concluded that approving a project, subject to later formulation of a plan for sludge disposal approved by other agencies, was facially reasonable but *factually unrealistic* because there was no prospect of finding a location to dispose of the sludge. Indeed, *Sundstrom* contrasted the conditions regarding air and water quality standards, in which the agency had " 'meaningful information' reasonably justifying an expectation of compliance" rendering these conditions proper, with the sludge condition where "the only information in the record concerning sludge disposal raised an obstacle to an environmentally satisfactory solution--the absence of *any* suitable disposal site in the county." (*Sundstrom, supra,* 202 Cal.App.3d at pp. 308-309, italics added.) *Gentry v. City of Murrieta, supra,* 36 Cal.App.4th 1359 is not applicable. The *Gentry* court concluded that, although it was improper under *Sundstrom* to defer formulation of a mitigation plan, the evidence presented a "fair argument" that there would be a significant impact even had a mitigation plan been presented, and therefore the lead agency's approval of the project through a mitigated negative declaration was invalid. (*Gentry,* at pp. 1396-1397.)

> realignment and the extent of mitigation, there is nothing in the record that demonstrates that the new information would alter these conclusions." (76 Cal.App.4th at p. 1450.)

Similarly, although the FEIR deferred the selection of the precise protective measure, there is nothing in this record suggesting that the evaluation contemplated by the FEIR would have produced information altering its conclusion that lateral spreading was mitigable to a level below significance. Additionally, because the Project permit is conditioned on Caltrans approval of the precise protective measure to be employed, the JPA "was certainly entitled to rely on this additional safeguard in deciding to defer a detailed analysis" of which protective measure would ultimately be implemented.[32] (*Riverwatch, supra,* 76 Cal.App.4th at p. 1450.)

We conclude the FEIR adequately considered, evaluated and articulated mitigation measures for the geological impacts of the Project.

D. The Pedestrian Access Measure

Owners argue that the mitigation measure of improving a public pedestrian pathway to avoid the necessity of traversing the open inlet mouth was inadequately evaluated as to feasibility and potential secondary impacts. Owners also argue this

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32 Owners also argue that, because the precise mitigation measure for the I-5 embankment is unknown, the EIR was inadequate because it did not consider whether the mitigation measure would itself create significant impacts. (Guidelines, § 15126.4, subd. (a)(1)(D).) Owners cite nothing in the administrative record suggesting this issue was raised at the administrative level, and therefore it is waived. (See part IV.G., *post*.) Moreover, to the extent this claim argues there are impacts *from the process of constructing* the protective measures, the FEIR did consider the impacts of the construction process and the FEIR contains extensive mitigation measures relating to construction activities.

mitigation measure contains insufficient design or performance standards, and there is no substantial evidence the pathway will mitigate the impacts of the open inlet mouth on pedestrians.

Evolution of Pathway Mitigation Measure

The DEIR evaluated the impact that a deepened River inlet mouth to the ocean would have on the ability of pedestrians to walk north and south along the beach and concluded that foot traffic across the inlet mouth would become relatively more difficult than under existing conditions.[33] The DEIR, after noting there was no proposed measure to create alternatives for north/south pedestrian access along the beach, classified this impairment as a significant and unmitigated impact of the Project.

However, during the public review process, the City of Del Mar provided information that it might be feasible to improve an existing but currently unimproved pedestrian pathway to provide a route around the inlet mouth.[34] The JPA incorporated this mitigation measure into the Project, and the FEIR specified the pathway would be incorporated into the existing riprap on the south side of the River and would be

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33 The FEIR noted that, under the Project's design, the inlet mouth would be "difficult" to cross approximately 80 percent of the time, representing about a 32 percent increase over existing conditions.

34 The existing path is an unimproved path on top of a riprap lining the southern side of the River and abutting the northern edge of Owners' property. The path connects the coast highway bridge to the beach. A northbound pedestrian could avoid fording the inlet mouth by using the path along the southern bank of the River from the beach to the bridge, crossing the River over the bridge, and returning to the beach along the sand lining the northern bank of the River.

"required to meet the design standards specified by the City of Del Mar." The FEIR concluded the impaired access impact of the deepened inlet mouth would be mitigated to a below significant level if the pathway were constructed but stated that if it was determined during Project design that the pathway was not feasible or could not be permitted by one of the permitting agencies, the impaired access impact would remain significant and unmitigated.

The JPA, evaluating the impact of the deepened inlet mouth on pedestrian access along the beach, concluded that construction of the new pathway appeared feasible and would mitigate to a level below significant the impaired north/south pedestrian access created by the deepened inlet mouth. The JPA also considered whether the new pathway would itself result in significant impacts, and concluded it would not because it would be constructed on public property on which an unimproved pathway already existed and experienced substantial usage, and the incremental increase in usage attending improvement would not be significant. The JPA also found the pathway would not impose significant adverse effects on Owners' residences because the pathway would be separated and buffered from the adjoining homes by an existing wall.

The JPA also included an alternative finding that, if a pathway ultimately could not be designed or permitted in a manner acceptable to the required permitting agencies, the measure would be deemed infeasible and would be deleted for specific legal, technological or other reasons. In that event, the JPA found the impaired access impact would remain significant and unmitigated but the benefits of the Project, including the

long-term enhanced recreational benefits, would override the Project's impact on pedestrians' ability to cross the river mouth.

Analysis of Owners' Claims

Owners first argue the FEIR inadequately evaluated the feasibility of improving the public pathway.[35] Owners argue there are a plethora of uncertainties whether the proposed pathway will ever be feasible, because any pathway design may or will be required to meet local regulations, federal laws, including the American with Disabilities Act, and compliance with CCC guidelines for shoreline access. Owners also cite evidence raising doubts whether the existing rip rap is sufficiently stable to ensure the integrity of a pathway. All of these concerns, argue Owners, demonstrate the FEIR was inadequate in considering the feasibility of this mitigation measure.

We conclude there is sufficient evidence to permit the JPA to conclude that an improved pathway was at least *potentially* feasible from a legal and technical standpoint and should therefore be incorporated into the Project, if possible, to mitigate the impaired pedestrian access impact of the Project. However, we need not definitively prognosticate

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35 Owners also argue this mitigation measure, by delegating approval for the pathway's design and performance standards to the City of Del Mar, does not comply with CEQA under the rationale of *Sundstrom, supra,* 202 Cal.App.3d 296. However, when a lead agency identifies the specific *nature* of the measure to be taken to mitigate a project impact, and directs that the measure be implemented in a manner that complies with the rules and standards applicable to the measure that other responsible agencies have promulgated, the requirements of CEQA are satisfied. (*Laurel Heights I, supra*, 47 Cal.3d at p. 418 [upholding noise mitigation measure that required compliance with noise performance standards]; *Riverwatch, supra*, 76 Cal.App.4th at p. 1450 [requiring realignment as approved by Caltrans is proper mitigation measure]; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355-1356.)

whether this measure will achieve all of the approvals necessary for its implementation because the JPA, after evaluating the only potentially available feasible mitigation measure for this impact and directing that it be implemented if possible, candidly recognized and acknowledged it might not be possible. The JPA, in recognition of that possibility, found that in such event the impaired access impact would be unmitigated but the benefits of the Project, including the long-term enhanced recreational benefits, would override the negative impact. This finding satisfies the requirements of CEQA. (*Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 244 [where all feasible mitigation measures have been imposed but unmitigable impacts remain lead agency may approve project if it adopts statement of overriding considerations as to any significant impacts that remain unmitigated].)

Owners alternatively assert the evaluation of the "secondary impacts" of the pathway was inadequate. However, CEQA "does not mandate perfection, [or] require an analysis to be exhaustive," but requires only a good faith, reasoned effort at full disclosure. (*Dry Creek, supra,* 70 Cal.App.4th at p. 26.) The JPA, addressing the secondary impacts, found the proposed improved pathway would be constructed over an existing pathway "that already experiences substantial public usage," and although the proposed improvement might lead to "an incremental increase in the use of the pathway over current conditions, no significant impacts are expected since access use is already occurring." The JPA also found there would be no significant adverse effect on the residents of Sandy Lane because the pathway would be "separated and buffered from adjoining homes by an existing wall." This analysis complies with the requirements of

CEQA of a good faith, reasoned analysis evaluating the secondary impacts of mitigation measures. (See, Guidelines § 15126.4(a)(1)(D) ["[T]he effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed."])

Owners finally assert there is no substantial evidence the pathway, when constructed, will mitigate the impact on public safety posed by the open inlet mouth. The FEIR noted that there are three types of aquatic mishaps that Del Mar Lifeguards respond to when natural conditions create strong currents near the inlet channel under its existing configuration: persons in the surf zone can experience more powerful rip currents; persons in the deep channel area near the bridge can lose their footing and be drawn toward the sea during outflow tides where wood pilings exacerbate the hazards; and persons in the deep channel area near the bridge can lose their footing and be drawn toward the lagoon during inflow tides where other pilings are present. The FEIR noted that, although the inlet depths and average currents resulting from the Project would be within the range of presently occurring depths and current, the design provides for an inlet that is wider and maintains a more constant depth at the beach than currently exists and will increase the *frequency* of tidal inlet currents, which might create an increase in number (but not types) of aquatic mishaps. The FEIR concluded this safety impact of the Project could be mitigated by staffing the lifeguard tower near the inlet on a more regular basis, by removing the wood pilings west of the bridge, and by providing a route around the inlet "via the pedestrian pathway along the Camino Del Mar bridge."

The JPA found the safety impact of the Project would be mitigated *by increasing the level of lifeguarding in the area*. There is substantial evidence to support this conclusion. (Guidelines, § 15384, subd. (a) [substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached" based on "the whole record before the lead agency"].) Here, the FEIR stated the same safety hazards currently exist and only the *frequency* of those events will be changed by the Project. Because the protections currently employed were through lifeguarding, a fair argument can be made that increasing the *frequency* of lifeguarding in the inlet area will mitigate the safety impact attributable to the Project.[36]

E. The Trails Measure

The Project includes constructing three trails: the Coast-to-Crest trail, the Mesa loop, and the Interpretive Overlook. CCC standards include a 100-foot buffer between wetlands and human activity, and the Project was designed to meet that standard to the extent possible. The Mesa loop and Interpretive Overlook trails fully comply with the 100-foot buffer. The Coast-to-Crest trail was designed to avoid sensitive habitat where

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[36] Although the JPA also cited as additional measures to reduce safety hazards the removal of the wood pilings and providing alternate access around the inlet *via the Camino Del Mar bridge*, the JPA did not rely on or even mention reliance on the proposed pathway *across the rip rap* as mitigating the safety hazards to beachgoers who attempt to cross the inlet mouth. For this reason, Owners' argument that the JPA's conclusion regarding safety impacts is unsupported because there is no evidence people will actually use the path across the rip rap to avoid the dangers of a river crossing is not persuasive.

possible by aligning it along the outer edge of the Project on existing disturbed areas; however, because of the extensive wetlands restoration and physical constraints, portions of the Coast-to-Crest trail have a buffer of fewer than 100 feet.

Owners argue the FEIR did not adequately evaluate the impact the intrusion into the buffer zone would have on biological resources, and therefore no substantial evidence supports the conclusion the FEIR's proposals would mitigate these impacts. However, in response to the CCC's comments over the inadequate buffer zone, the FEIR noted that the trail alignment was the best feasible alignment among the available alternatives, the CCC permits deviations from the 100-foot buffer for "constrained projects," and although the buffer was fewer than 100 feet in several places, the measures included in the FEIR and the Park Master Plan would permit the buffer to function as intended and would reduce the impacts to a level below significance.[37] The JPA recognized that because the public currently uses a series of informal trails through the wetlands (for themselves, their pets, and off-road vehicles), causing trampled habitat and disrupted nesting sites and despoiled

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37 For example, the two longest segments with fewer than 100-foot buffering were placed over existing easements already used as rights of way for a driveway or to maintain fiber optic cables, and berms will separate other intruding portions of the trail from the restored vegetation. The FEIR also noted that most of the trail is located over existing trails, roadbeds or areas currently impacted by human use, and that under current conditions the public is coming as close (or closer) to wetlands than they would with the proposed trail alignment. The FEIR also described several mitigating measures (fencing separating the trail from the most sensitive resources; not lighting the trail and posting the trail "closed" after dark; patrolling to ensure the public respects sensitive areas; systematic monitoring to detect areas of intrusion with remedial action if such intrusion is detected; dog regulations; establishing and maintaining buffer vegetation), to mitigate the impacts of human use of the trail on sensitive resources.

wetlands, replacing this *existing unregulated* access with a trail system that is well-planned, controlled, buffered, and policed will mitigate the adverse impacts on the wetlands from existing human use.

Owners concede the FEIR responded to the CCC's questions concerning how "impingement on buffers will be mitigated or ameliorated." However, Owners argue the FEIR was nevertheless inadequate because it did not identify which *specific* endangered or threatened species were in proximity to the unbuffered segments of the trail or how these specific endangered or threatened species would be impacted by this type of contact, and that without this information there was no meaningful way to determine whether potential impacts could have been mitigated by realigning or abandoning those trails. However, the FEIR includes extensive information concerning the types of species and habitats that currently exist and are projected to exist after the Project is completed, including the locations of habitats and nesting areas created by the Project and the configuration of the public trails in relationship to those new habitats and nesting areas. An EIR must provide a good faith effort at full disclosure, and CEQA "does not mandate perfection, nor does it require an analysis to be exhaustive" (*Dry Creek, supra,* 70 Cal.App.4th at p. 26); the EIR is reviewed in the context of what is reasonably feasible. (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 862.) The FEIR, viewed as a whole, was prepared with a sufficient degree of analysis and information to enable the JPA to make its decision informed of the environmental consequences and benefits of this Project (Guidelines, § 15151), including the relative benefits and detriments of a trail alignment that occasionally intruded into the 100-foot

buffer. The FEIR is adequate on this issue and provides substantial evidence to support the JPA's findings that the trail alignment, as mitigated by the various protective measures, reduced the human use impact of the Project to a below significant level.

F. The Public Utilities Issue

Owners assert the FEIR was deficient in its evaluation of the Project impacts on utilities. The Project contemplates realigning power lines from their existing configuration through the middle of the restored wetlands into a new alignment that skirts rather than traverses the newly restored wetlands. The FEIR examined five alternatives, and selected the alternative that placed a 2700 foot segment of above-ground power lines in a corridor parallel to an existing east-west roadway (Via de la Valle). The corridor is approximately 75 feet south of the roadway along the northern boundary of the Project area.

Owners argue that placing the power lines in this selected corridor will have a significant impact on utilities because the corridor is within area U18 planned to be reseeded into a Coastal Sage Scrub habitat, which is a type of habitat favored by the Coastal California Gnatcatcher, an endangered species. Owners argue that if area U18 becomes repopulated by the Gnatcatcher, there will be seasonal access restrictions to the power lines for repair and maintenance operations, which would be deemed a significant impact under the FEIR. Owners therefore argue the power line configuration created a potential for a significant impact, and the FEIR should have recognized this impact and discussed potential mitigation measures.

However, the FEIR as a whole provides substantial support for the FEIR's conclusion that a power line corridor 75 feet south of the existing roadway "would not be significantly affected by seasonal access constraints." Other maps contained in the FEIR show a "100 [foot] buffer for future widening of Via de la Valle" south of the existing roadway (see Figure 2.3.1-14a), and it appears the power line corridor would not be placed *within* a restored site but rather within this buffer zone. The FEIR explained that a major reason for preferring this alignment was that "[p]lacing segments [along Via de la Valle] *in easement positions directly adjacent to street rights-of-way would eliminate seasonal restrictions to access* along these line segments . . . ." (Italics added.) There is substantial evidence in the FEIR as a whole to support the finding that the selected routing for power lines would not create seasonal access restrictions.[38]

G. The Remaining Challenges

Owners raise three additional challenges to the adequacy of the FEIR: the FEIR's conclusion the Project would cause no groundwater impacts to an inland freshwater aquifer was not based on a good faith, reasoned analysis supported by substantial evidence; the evaluation and mitigation of impacts from possible munitions was insufficient; and the evaluation of the impacts the Project would have on leaking

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38 Owners argue the FEIR stated that seasonal access restrictions could only be avoided if power lines were constructed "directly adjacent" to street rights-of-way, and argues that placing them 75 feet south of Via de la Valle "can hardly be said to be 'directly adjacent' to Via de la Valle." However, we decline Owners' implicit invitation to reweigh the evidence to decide how many feet does or does not qualify as sufficiently "directly adjacent" to Via De la Valle to provide the unimpeded access contemplated by the FEIR.

underground storage tanks (UST's) on property outside the boundaries of the Project area was insufficient.

Although a variety of comments and objections to the DEIR and FEIR were raised at the administrative level, Owners cite nothing in the administrative record showing these *specific* alleged deficiencies were raised during either the period provided for public comment on the DEIR or during the subsequent period before the JPA's hearing at which it certified the FEIR.[39] Respondents argue the doctrine of exhaustion of administrative remedies bars Owners from judicially attacking the FEIR based on alleged deficiencies not raised before the administrative agency.

The essence of the exhaustion of administrative remedies doctrine is that a public agency must be given the opportunity to receive and respond to articulated factual issues and legal theories before its actions are subject to judicial review (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198), and judicial review is precluded unless the issue was first presented at the administrative level. (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894.) Accordingly, Public Resources Code section 21177 requires, as a condition to judicial review, that the alleged grounds of noncompliance with CEQA's requirements be

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39 Owners' extensive briefing contained no references to the record where these objections were interposed at the administrative level, and we therefore requested supplemental briefing to provide Owners the additional opportunity to satisfy their burden of showing the issue was preserved. (See generally *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 877, mod. 10 Cal.App.4th 666d.)

presented to the public agency during the public comment period or prior to the close of the public hearing on the project before the notice of determination is issued.[40] "Although it is true the plaintiff need not have *personally* raised the issue [citation], the exact issue raised in the lawsuit must have been presented to the administrative agency so that it will have had an opportunity to act and render the litigation unnecessary. [Citation.]" (*Resource Defense Fund, supra,* at p. 894; accord, *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.)

If no one during either the comment period or the final hearings identifies alleged insufficiencies in the EIR's identification or analysis of specific impacts or in the EIR's proposed measures for mitigating or avoiding those impacts (Guidelines, § 15204), the agency is deprived of the opportunity contemplated by the CEQA scheme to amend the EIR or explain the basis for its approach. The doctrine of exhaustion of administrative remedies precludes a project opponent from asserting theretofore unidentified deficiencies as a basis for judicially challenging the EIR's certification. Owners argue

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40 Owners argue the language of Public Resources Code section 21177, requiring objections be raised during the comment period or prior to the close of the public hearing, makes it unclear whether objections raised *before* the draft EIR is released for review are sufficient to preserve the issue. (See generally *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1119-1121 [objection raised prior to certification is sufficient even though not raised during comment period].) However, an objection attacking the sufficiency of the EIR's treatment of an issue must necessarily be raised *after* the draft has been prepared, and raising an issue *during the scoping phase* cannot give the agency notice that its subsequent treatment of that issue in the draft might be deficient. We therefore do not accept Owners' argument that issues mentioned before the comment period preserve an objection to the draft EIR's subsequent treatment of those issues.

that because respondents did not assert (either at trial or in their initial set of briefs on appeal) that these deficiencies had not been raised during the comment or final hearing phases of the EIR proceedings, respondents should be precluded from now interposing the "exhaustion of administrative remedies" bar as to these specific deficiencies.[41] However, exhaustion of administrative remedies ordinarily is a jurisdictional requirement for challenging an administrative decision (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 993; 2 Kostka & Zischke, "*Practice Under the California Environmental Quality Act*" (CEB 2003) § 23.93, p. 1010), and the language of Public Resources Code section 21177 supports the conclusion that exhaustion is an essential predicate to judicially challenging the FEIR's treatment of the particular issue. The underlying purpose of Public Resources Code section 21177's requirements would be frustrated if Owners could successfully vacate the JPA's certification of the FEIR based on alleged inadequacies in the FEIR that the JPA had no opportunity to correct because they were not asserted during the comment and final hearing phases. Accordingly, we

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41 We acknowledge that there is a split of authority on whether the administrative exhaustion requirement is appropriately characterized as a "jurisdictional" requirement. (Compare *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 440-441 [collecting cases holding exhaustion is jurisdictional requirement that can be raised at any time] with *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222 [exhaustion is affirmative defense that may be waived at trial].) In the present context, however, we are convinced the JPA's failure to raise the claim at trial does not waive the issue because our analysis of the issues presented by Owners' challenge applies the same standard of review based on the same administrative record considered by the trial court, and therefore depriving the trial court of the opportunity to address the issue has no impact on our resolution of the merits of Owners' challenges.

hold Owners may assert only those deficiencies in the FEIR specifically identified in the administrative proceedings.[42]

We examine each of the remaining challenges to determine whether they were sufficiently raised to preserve them for judicial review.

The Groundwater Issue

The FEIR, after describing the existing groundwater conditions of the Project area and the area upstream from the Project,[43] concluded the increased or altered tidal flow created by the Project would not adversely impact groundwater contained in an inland aquifer. The FEIR reasoned that "[s]altwater intrusion would not be substantially

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42 Owners rely on *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745 to argue that an agency must raise the exhaustion of administrative remedies argument at trial or it is waived. However, that case evaluated whether the appellant, who otherwise would lack *standing* because it had not objected to the project at the administrative level (2 Kostka & Zischke, *supra*, at § 23.95, p. 1014), qualified under the exemption (see Pub. Resources Code, § 21177, subd. (c)) permitting an organization formed after project approval to pursue judicial challenges to the project. (*Save Our Residential Environment,* at p. 1750.) There the court held merely that proof of that exemption is not formally required "*when there is no real dispute that the requirement was in fact met*." (*Ibid.,* italics added.) Here, unlike the issue raised in *Save Our Residential Environment*, there *is* a real dispute whether the issue preservation requirement of Public Resources Code section 21177 was satisfied.

43 The DEIR disclosed that groundwater under the Project area is already saline, and that ocean and tidal forces provide a constant source of saline groundwater to the underlying sediments. There is an existing shallow freshwater aquifer some distance inland from the Project area (with the main withdrawal pump approximately 1.25 miles inland from the Project), and a boundary exists between existing saline groundwater underlying the lagoon and the freshwater aquifer as the result of different hydrologic pressures. The primary variable influencing the intrusion of saltwater into the freshwater aquifer is the reduction (from seasonal pumping and reduced influxes from drought) in the amount of freshwater in the aquifer.

increased or decreased by the project because the rate of groundwater withdrawals upstream from [the Project boundaries] would not be affected by the proposed project."

Owners argue the FEIR did not provide a good faith, reasoned analysis of this issue, making the JPA's conclusion of no adverse impact on groundwater supplies unsupported by substantial evidence. However, the FEIR's analysis of this issue, and the conclusions it reached, were unchanged from the analysis and conclusions contained in the DEIR, and it appears that no person during the comment period raised any assertion that the DEIR's analysis of this issue was inadequate.[44] We therefore conclude Owners may not raise this alleged specific deficiency because this specific issue was not raised in the administrative proceedings.

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44 Owners do not identify any portion of the record demonstrating a project opponent *during the comment period* asserted there was inadequate analysis of whether the Project would adversely impact the freshwater aquifer. In their supplemental letter brief, Owners cite only two references to this issue. First, a "water authority representative" appeared at a 1992 Lagoon Restoration Workshop, noted a groundwater study was being conducted and concluded that consideration should be given to the interface between the Project and plans to discharge groundwater into the river and to potential salinity issues. Second, Owners cite a 1997 study (prepared in consultation with Hargis & Associates, Inc.) concluding that saltwater could be kept out of the aquifer through use of hydraulic pressure barriers, and that without barriers water quality would decline "following prolonged dry periods and continued pumping." However, this study appears to have been conducted to provide the water agency with an assessment of the impacts of excessive withdrawals of freshwater from the aquifer, not the impacts of tidal basins on the aquifer. Because the DEIR and FEIR cited Hargis for its conclusion that it is *extractions* from the aquifer that promotes seawater intrusion, the FEIR appears to have taken into consideration available information when it concluded saltwater intrusion "would not be substantially increased or decreased by the project *because the rate of groundwater withdrawals upstream* . . . would *not* be affected by the proposed project." (Italics added.) Thus, the cited portions of the record do not demonstrate *an objection* to the conclusion *during the comment period*, but instead show the conclusion in the FEIR on this issue was based on available information.

The Leaking Underground Storage Tanks Issue

Owners assert the FEIR was inadequate because it did not contain a good faith analysis of the Project impacts in relationship to leaking UST's located north of and outside the boundaries of the Project. The DEIR recited that the two sites where extensive Project excavations are planned (the airfield site and the Horseworld site) had been subjected to three separate soil testing studies in which borings were taken and tested for contaminants.[45] These studies found the soils in each of the scheduled excavation areas were free of significant contaminants. The DEIR, under the heading of "Other Areas," also described potential contaminated sites *outside* the Project area, including the leaking UST's at the Del Mar Fairgrounds under the Del Mar Thoroughbred Club (DMTC) some distance north of the River.[46] The FEIR's discussion of the leaking UST's was unchanged.

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45 Testing was conducted in 1991 by Tetra Tech, Inc., in 1992 by MEC Analytical Systems, Inc., and in 1999 by Ogden Environmental and Energy Services Co., Inc.

46 The DEIR, discussing these leaking UST's, stated: "The exact location of these UST sites within the Fairgrounds, with respect to the San Dieguito Lagoon, is unclear. These sites are located to the north of the river *outside the proposed boundaries of the proposed excavation area* for the current project. The soil and groundwater have been adversely impacted by petroleum hydrocarbons . . . *at each of these sites*, however, it is currently unclear whether the contamination extends into the lagoon restoration area. Groundwater is present at a depth of 5 to 6 feet at the UST sites . . . ." (Italics added.) The italicized language demonstrates the DEIR concluded that soil scheduled for excavation by the Project was uncontaminated, and soil contaminated by the leaking UST's were outside of the Project area. An EIR must evaluate impacts of the project, not the impacts to the environment of preexisting conditions. (*Baird v. County of Contra Costa, supra,* 32 Cal.App.4th at p. 1468.)

Owners argue the FEIR was inadequate because it is possible the toxic plume might have spread south and invaded the airfield site *after* the 1992 soils testing was conducted, and therefore the conclusion that the airfield excavation site was free of significant contaminants was predicated on outdated and unreliable data.[47] Owners alternatively argue the FEIR was inadequate because, even if the plume has not reached south under the existing river bed and into the airfield soils south of the River, there was no testing on the northern bank of the River on land outside the Project area to determine whether the toxic plume has invaded or threatens to invade the River channel.

Owners cite nothing in the administrative record showing that anyone during the comment period raised any assertion that the DEIR's analysis of the impacts of the Project *in relationship to leaking UST's* was inadequate in the specifications now asserted by Owners.[48] We therefore conclude these arguments are not preserved.

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47 Although we conclude this specific claim was not preserved, we note the FEIR provides substantial evidence supporting a conclusion the Project would not exacerbate petrochemical contamination from the UST's. Insofar as Owners claim the data *for the Project area* was outdated, we note that Ogden's 1999 report included updated borings to a depth of 50 feet at 10 different locations on the airfield property scheduled for excavation, and testing found no chemical contaminants. Owners' argument requires speculation that, between 1992 and 1999, the toxic plume might have migrated south and crossed the river bed, *without have any detectable impact on the River water,* and then invaded the airfield property into previously bored areas, but fortuitously stopping short of the new boring sites.

48 Owners argue the issue was preserved because, during the comment period, the federal Environmental Protection Agency (EPA) and the League for Coastal Protection alluded to potential contamination problems at the former airfield site. However, the EPA letter stated that because the property had served as a military and civilian airfield, there was a potential for discovery of "contaminated soil or hazardous waste," and that although soil testing indicated the "areas that would be excavated do not contain

The Munitions Issue

Owners finally argue the FEIR was inadequate because it did not evaluate the safety hazards presented by the potential presence of unexploded munitions at the airfield site to be excavated as part of the Project, and because it failed to impose as a mitigation measure a preemptive sweep to search for munitions before excavating and a protocol for removing any munitions discovered during the preemptive sweep. Owners cite nothing in the administrative record suggesting these purported deficiencies in the DEIR were timely raised by any person, and thus this claim is not preserved.[49]

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substantial concentrations of chemical contaminants[,] . . . [n]evertheless, to ensure the safety of restoration crews and the public, we strongly recommend a soil contamination monitor and a monitoring, emergency response, and reporting plan be included . . . ." The League comments similarly asked what contingency plans existed if "problem structures, e.g., underground storage tanks, obviously contaminated soils, etc. are encountered during excavation?" These comments show the concerns were over chemically contaminated soil *because the property had served as a military and civilian airfield*, not because they questioned the DEIR's analysis of the impacts of the Project *in relationship to leaking UST's from an adjoining property.* Moreover, the prophylactic measures suggested by the EPA to address concerns about contaminated soil were incorporated into the FEIR and adopted by the JPA. The JPA's response to the EPA's concerns and suggestions highlights the wisdom of enforcing Public Resources Code section 21177's exhaustion of administrative remedies requirements, because the JPA *did* modify the FEIR as to alleged deficiencies brought to the JPA's attention during the comment period.

[49] Owners argue the issue was preserved by citing the same EPA and League for Coastal Protection comments about potential contamination problems. However, the EPA's letter (see fn. 48, *ante*) shows it was concerned about possibly encountering chemically contaminated soil, not unexploded munitions; prophylactic measures to address concerns about contaminated soil were incorporated; and the JPA (apparently out of an abundance of caution) added munitions to the monitoring, emergency response, and reporting plan for excavating the airfield, even though all available evidence suggested there were *no* unexploded munitions on the site. The failure of any person to object to the "munitions" evaluation/mitigation precluded the JPA from deciding that a risk of

V

ANALYSIS OF ISSUES ON OWNERS' CROSS-APPEAL

Owners' cross-appeal asserts the FEIR's *alternatives analysis* was inadequate because all alternatives evaluated by the FEIR, other than the *no project* alternative, featured a restored wetlands employing ocean tidal basins protected by berms and nourished by tidal influxes of ocean water through a permanently open lagoon entrance to the ocean. Owners argue the FEIR was inadequate because it omitted any consideration of alternatives that could restore the wetlands while avoiding or reducing the alleged adverse impacts, including beach erosion and disrupting existing habitats and species, that accompany the design proposed by the Project. Owners point out the FEIR could have considered, as an alternative that obviated the need for a permanently open lagoon mouth, a Project to restore the wetlands to a *freshwater* wetlands condition by introducing additional freshwater into the River to nourish the wetlands. Owners alternatively argue that, even if it were proper to limit the goal of the Project to one seeking to restore the wetlands using tidal influxes of ocean water, the FEIR's discussion of the reasons it selected a permanently open lagoon mouth as the ocean water delivery system while rejecting other alternatives for delivering ocean water was too cursory and conclusory to satisfy the alternatives analysis requirements of CEQA.

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sufficient substantiality existed to warrant the measures that Owners now argue were required, or from making a finding that no such risk existed.

A. Legal Standards

The mitigation and alternatives sections have been described as the "core of an EIR" (*Goleta Valley II, supra,* 52 Cal.3d at p. 564), because the policy in California is to consider alternatives to proposed actions that significantly impact the environment. (*Laurel Heights I, supra*, 47 Cal.3d at p. 400.) Accordingly, the EIR must identify the significant effects of a project on the environment, identify alternatives to the project, and indicate the manner in which those significant effects can be mitigated or avoided. (Pub. Resources Code, § 21002.1, see also § 21002 ["[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects"].)

The court in *Goleta Valley II*, describing the nature and scope of alternatives that must be examined in an EIR, stated:

> "[T]he Legislature has decreed that local agencies shall be guided by the doctrine of 'feasibility.' . . . [¶] The Legislature has defined 'feasible,' for purposes of CEQA review, as 'capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.' [Quoting Public Resources Code, § 21061.1; citations.] Both the California and the federal courts have further declared that '[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason.' [Quoting *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* [(1980)] 106 Cal.App.3d 893, 910; citations.] . . . [¶] These statutory and judicial concepts are carried forward in the Guidelines, which state that an EIR must '[d]escribe a range of reasonable *alternatives to the project* . . . , which could feasibly attain the basic objectives of the project, and evaluate the comparative merits of the alternatives.' [Quoting former Guidelines, § 15126, subd. (d), italics added by *Goleta Valley II*.] . . .

> "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. Informed by that purpose, we here reaffirm the principle that an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project . . . which: (1) offer substantial environmental advantages over the project proposal [citation]; and (2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved. [Citations.]" (*Goleta Valley II, supra,* 52 Cal.3d at pp. 565-566.)

Therefore, an EIR must "describe a range of reasonable alternatives to the project . . . [that] would *feasibly attain most of the basic objectives of the project* but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a) [italics added].) An alternative both feasible and capable of eliminating significant adverse environmental effects or reducing them to a level of insignificance should be discussed and evaluated even if such alternative "would impede to some degree the attainment of the project objectives, or would be more costly." (Guidelines, § 15126.6, subd. (b).)

When selecting the range of reasonable alternatives for detailed analysis in the EIR, the lead agency must initially identify potential alternatives that meet the threshold test for suitable alternatives and may exclude from further consideration those that do not meet the threshold standards. (See generally 1 Kostka & Zischke, "*Practice Under the California Environmental Quality Act*" (CEB 2003) §§15.5-15.6, pp. 586-587.) As explained by Guidelines Section 15126.6, subdivision (c):

> "Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that

> could *feasibly* accomplish *most of the basic objectives* of the project and could avoid or substantially lessen one or more of the significant effects. The EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and *briefly* explain the reasons underlying the lead agency's determination. Additional information explaining the choice of alternatives may be included in the administrative record. *Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts*." (Italics added.)

Thus, an EIR need not conduct a detailed evaluation of an alternative that does not satisfy most of the project objectives, or is not feasible based on economic, legal, technological or other considerations, or would not reduce or avoid significant environmental impacts of the project. (*Guidelines,* § 15126.6, subd (f).)

Considering this legal background, we examine the process by which the JPA determined which alternatives merited extended analysis in the FEIR.

B. Evolution of Selected and Rejected Alternatives

The plan for the Park, adopted by the JPA in early 1994, stated that "[a]ll future proposals within the planning area should be consistent with the goal, objectives and development standards set forth in this plan." The plan, which identified lagoon restoration as a central component of the Park, stated, "This Concept Plan endorses the proposal to restore the [lagoon] and its associated wetlands ecosystem. Restoration would involve the *enlargement of the existing tidal basin*, creation of a variety of *coastal* wetland habitats, and the restoration of associated upland habitat in order to create a

functional ecological and hydrological [unit] *that will provide for tidal flushing, open water, wetlands*, and grassland and other upland habitat."[50] (Italics added.)

The Project EIR identifies as one of its principal objectives the restoration of habitats that historically existed in the lagoon area,[51] and explained that an "essential component" for achieving that objective was the "creation and restoration of tidally influenced wetlands. The major elements of tidal restoration would include: (1) restoring aquatic functions of the lagoon through the opening and permanent maintenance of the

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50 In the Program EIR, certified in 1994 in conjunction with adoption of the Plan, the JPA recognized that the most significant activity within the lagoon landscape unit was a proposal "to permanently open the mouth of the lagoon," but concluded the impacts from this proposed conversion of habitat from "disturbed ruderal" to "estuarine" were not significant adverse impacts. The JPA also noted in the Program EIR that restoration of the degraded wetlands in the lagoon area "would require the creation of an increased tidal prism and increased tidal flows in order to keep the river mouth open most if not all of the time."

51 Owners note a basic objective of the Project (as well as of the Plan) was to *restore* the historical habitats in the Project area. However, Owners argue that because the *historical* conditions in the Project area were marshland hydrated primarily by the River (with a closed river mouth that opened to the ocean only when flooding scoured the inlet mouth and temporarily allowed an influx of ocean water) without permanent bodies of open salt water, an alternative that could have met the basic goal of *restoration* would be a Project that retained the closed River mouth feature and relied on fresh water to nourish the wetlands. However, the evidence appears to support the conclusion the Project area began as a deep ocean embayment, and that as recently as the early 1900's there was sufficient freshwater flow into the lagoon to keep the channel open "year round," but that construction of two up-river dams eliminated the periodic floods that "previously helped to keep the lagoon channels free of silt and the lagoon mouth open to tidal exchange." Thus, to the extent Owners argue the Project as designed does not *restore* the wetlands but instead seeks to create a system different from that which had ever been present, there is substantial evidence to support the JPA's conclusion that a design featuring inland bodies of water replenished by tidal influxes through an open inlet mouth was an effort to restore (rather than change) previously extant conditions.

inlet channel and expansion of the existing tidal prism, and (2) creating subtidal and intertidal habitats on both the east and west sides of Interstate 5 . . . ." The Project EIR then explained that a four-step process was employed to define, screen and ultimately select feasible alternatives to achieve the goals of the Project: (1) first, the goals, objectives and regulatory and physical constraints were identified; (2) priorities among the goals were established to allow for trade-off among competing goals; (3) design and performance standards were developed to reflect the goals and objectives; and (4) alternatives were evaluated based on compliance with the design and performance criteria. Additionally, an overall policy statement, developed to guide the selection process, provided that "[p]reservation and enhancement of biological functions is the overriding objective" of the project.

The goals and objectives for the Project were identified by the Working Group in the early planning stages of the Project.[52] The Project goals included (1) improving,

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[52] Owners, noting that project objectives cannot be narrowed or manipulated to unduly constrain a proper alternatives analysis (see, e.g., *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455; *Save the Niobrara River Ass'n v. Andrus* (D.Neb. 1977) 483 F.Supp. 844), impliedly denigrate the import of these stated objectives by asserting that they were formulated by "[SCE's] Working Group" and SCE was predisposed (for economic reasons) to promote a Project featuring an open lagoon mouth and large subtidal basins. However, the preference for tidally nourished wetlands with an open lagoon mouth, rather than a freshwater-nourished wetlands with a primarily closed lagoon mouth, had been advocated by groups interested in restoring the lagoonal wetlands long before SCE became involved in the Project. For example, a 1979 study evaluated three different water regimes (saltwater/marine wetlands, intermittent fresh-salt water wetlands, and fresh-brackish water wetlands), rejected the freshwater lagoon option, identified "permanent salt water" as the preferred regime, and recommended a self-sustaining open lagoon entrance (to increase the tidal prism) and creating basins. A 1980 study also considered different alternatives (freshwater, intermittent freshwater and

preserving and creating a variety of habitats, (2) insuring adequate tidal and fluvial flushing and circulation with an optimal tidal regime to support a diversity of biological resources while maintaining the appearance of a natural wetlands ecosystem, (3) maintaining the integrity of beach and sand balance to avoid net loss of beach sand near the River mouth, and (4) maintaining existing conditions of River scour and sand movement through the River.

The FEIR then explained the process by which the range of alternatives, all of which were to effectuate the principal goal of creating/restoring tidally influenced wetlands, were screened for further evaluation.[53] The FEIR also explained that a number of options were considered for maintaining the tidal exchange within the restored system, ranging from an open inlet mouth using mechanical means to keep the inlet open to more experimental methods for achieving tidal exchanges including, for example, siphons, Phoenician flushing, installation of fluidization and/or crater sink bypass

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saltwater, and saltwater habitats) for restoring the lagoon, and identified the saltwater system (including basins) as the preferred alternative because it produces the "highest quality, stable habitat" because tidal flushing would preclude or alleviate problems resulting from stagnation, pollution, eutrophication, rapid changes in salinity, and excessive breeding of pest insects. Thus, we do not accept Owners' implied argument that the Project's goals and objectives were improperly manipulated or cabined by SCE to hijack the Project or to avoid analyzing alternative designs that might have produced a Project design disfavored by SCE.

53 A variety of conceptual configurations for tidally influenced wetlands were considered, but some were rejected because they did not meet the Project criteria. For example, a configuration maximizing subtidal habitats was rejected because it destroyed significant areas of existing salt marsh, while a concept maximizing intertidal mudflats was rejected because it did not create adequate fish habitat and may have been infeasible because of a reduced tidal prism.

systems. The FEIR also briefly explained the reasons for rejecting these latter concepts in favor of using an open inlet mouth to maintain the desired tidal prism.

Ultimately, the FEIR evaluated five *action* alternatives, all of which featured the use of berms to preserve restoration acreage and to maintain sediment deliveries to the beach and the use of an open inlet mouth to the ocean to permit the tidal and fluvial flushing and circulation required to maintain the health of the restored areas.

Owners argue that because all of the five action alternatives had the same core design elements of tidal basins, berms and an open inlet mouth, they were merely minor variations of the same Project rather than a consideration of true alternatives, and therefore the alternatives analysis was inadequate.

C. Preservation of Issue

Owners argue the FEIR's alternatives analysis was inadequate and cite, as evidence that the consideration of alternatives was improperly truncated, that the FEIR did not consider an alternative of restoring the wetlands by introducing additional freshwater into the River to nourish the wetlands while retaining a closed lagoon mouth. Respondents argue Owners are barred from asserting that the failure to consider a freshwater alternative made the FEIR deficient because that specific deficiency was not raised in the administrative proceedings. Respondents argue Owners should therefore be barred from asserting this deficiency because Owners did not exhaust their administrative remedies by raising this specific claim. (See part IV.G., *ante*.) Owners respond that, as long as any member of the public generically objects during the administrative process that a draft EIR is inadequate in its consideration of feasible alternatives, the issue is

preserved because the "substance of the issue" was raised. (*Save Our Residential Environment v. City of West Hollywood, supra,* 9 Cal.App.4th at p. 1750.) Owners note there was a generic objection to the DEIR's alternatives analysis raised in the administrative hearings, and therefore argue the issue is preserved for appeal.[54]

Although it is the responsibility of the project proponent to provide an adequate discussion of alternatives *in the first instance* independent from a showing by the public of feasible alternatives (*Laurel Heights I*, supra, 47 Cal.3d 376), an EIR need not evaluate every possible alternative as long as it evaluates a "reasonable range" of alternatives (*Goleta Valley II, supra*, 52 Cal.3d at p. 566) and "briefly explains" its reasons for rejecting detailed analysis of other potential alternatives. (Guidelines, § 15126.6, subd. (c).) Accordingly, when a draft EIR contains the agency's explanation of the reasons it selected some alternatives but rejected other alternatives for detailed evaluation, and no opponent during the comment period identifies a feasible and environmentally superior alternative that was overlooked and should have been screened in the scoping process for alternatives, the agency is deprived of the opportunity to respond to or correct purported deficiencies by amplifying its analysis or explaining the reasons it did not conduct a

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54 A private citizen objected to the DEIR's analysis of alternatives, stating the "analysis of feasible and environmentally superior alternatives to permanent channel opening is woefully inadequate"; he then cited the 1980 study identifying buried siphon pipes as an alternative to a permanent open channel and suggested that "*this* feasible and environmentally superior alternative must be analyzed in detail or the [DEIR] will be deemed inadequate." (Italics added.) In response to that comment, the FEIR was modified to explain why buried siphon pipes were one of the alternatives considered but not carried forward.

detailed analysis of the undisclosed alternative. (See generally *Coalition for Student Action v City of Fullerton, supra,* 153 Cal.App.3d at p. 1198 ["The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review."], original italics.)

Here, to the extent the public did raise *specific* objections during the comment period to the adequacy of the DEIR's alternatives analysis, including alternatives to an open inlet mouth, respondents were provided an opportunity to *and did* respond (as required by Guidelines, § 15126.6, subd. (c)) with explanations why it rejected detailed analyses of other potential alternatives to an open inlet mouth. The failure to raise the "freshwater option" during the comment period precluded respondents from providing a similar response explaining why this option was not evaluated, and we conclude it would offend the policy underlying the requirement for exhaustion of administrative remedies to allow project opponents to withhold that objection and permit the agency to certify the FEIR but to thereafter assert the FEIR was inadequate because it did not assess the feasibility of this undisclosed alternative. Accordingly, to the extent Owners argue the FEIR is inadequate for not assessing a freshwater alternative, that issue is not preserved.

Even assuming Owners may raise this claim, CEQA does not require that an EIR include a detailed assessment of an alternative that does not achieve most of the basic project objectives, is not feasible, or does not avoid the significant environmental impacts of the project. (See, e.g., *Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 845 [EIR need not discuss "results of

unfruitful investigations or pursuits down blind alleys, but only 'an analysis of those alternatives necessary to permit a reasoned choice' [citation], and which are feasible"].) Here, the record contains substantial evidence to support a conclusion a freshwater option would *not* have achieved most of the basic Project objectives. The basic objectives of the Project were to restore, improve, preserve and create a variety of *coastal* wetlands habitats using *tidal* and fluvial flushing and circulation with an *optimal tidal regime* to support a diversity of biological resources. The "freshwater option," presumably featuring an ocean inlet closed most of the time and depending principally on freshwater infusions to hydrate the wetlands, would certainly have impeded the goal of a *tidally*-influenced wetlands habitat. That option could also have impeded the goal of a healthy wetlands by depriving it of the benefits provided by tidal flushing. For example, the 1980 Sea Sciences Report cautioned that flows from the River are highly intermittent, and "[f]or this reason, the stability of aquatic faunal populations may be largely dependent upon continuous tidal flushing. . . . [¶] . . . In tidal marine systems, salinities and temperatures tend to be moderated, due to the circulation of water at regular intervals. In stagnant or enclosed waters, especially shallow waters, extreme conditions commonly occur. Such conditions may place severe stresses on all but the most tolerant aquatic organisms. The death of the less tolerant organisms will result in a reduction in the diversity of species." Thus, the freshwater option, in which there would be infusions but not regular *flushings*, may not have satisfied a basic objective of preserving a healthy, diverse wetlands. The record also contains substantial evidence to support a conclusion that a freshwater option was not a *feasible* option because (1) existing freshwater flows

are inadequate (indeed, relying on existing freshwater flows appears tantamount to the "no project alternative" evaluated by the FEIR); (2) there is no potential for using Lake Hodges to deliver water into the River for wetlands hydration because Lake Hodges does not have the capacity for manual releases of water but instead releases water on overflows, which may not occur for years at a time; and (3) fresh water would have to be purchased (from sources that could become unavailable in drought periods) and delivered (through an undefined delivery system), in sufficient quantities to create a sufficiently deep body of water (to avoid creating mosquito habitats), and with frequent exchanges of the water to maintain the health of the marsh (10 to 30 days if using imported or groundwater and more frequently if using reclaimed water) by unspecified mechanisms and employing undisclosed disposal or recirculation methods. Finally, the record contains substantial evidence to support a conclusion that a freshwater option would *not* have avoided any *adverse* impacts of the Project, and may itself have carried dangers, including increased risks of flooding if a permanently diked inlet mouth was used to insulate a freshwater lagoon from the ocean, not presented by the Project alternatives that were considered.[55] We need not invalidate an EIR for an insufficient alternatives

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55 Although this evidence does not mean the JPA would have *necessarily* found the freshwater option would not achieve most of the basic Project objectives, be feasible, or avoid the significant environmental impacts of the Project, this evidence does reinforce (and highlight the wisdom of) our principal conclusion that the failure to exhaust administrative remedies precludes assertion of this issue now. There are myriad reasons why a freshwater option was not within the range of reasonable alternatives considered by the FEIR, but the failure to raise the issue below deprived the JPA of the opportunity to *evaluate and explain* why a freshwater option was not pursued as a feasible alternative.

analysis merely because an opponent speculates there were undefined feasible alternatives not evaluated (*Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com*. (1992) 10 Cal.App.4th 908, 922-923), and we therefore decline Owners' invitation to invalidate the FEIR because it did not consider a speculative alternative.

D. Adequacy of Alternatives Analysis

Apart from the *freshwater option* argument, there were specific objections to the DEIR's alternatives analysis raised during the comment period. One set of comments objected that the DEIR overlooked one alternative *to a permanently open inlet mouth*--buried siphon pipes to convey sea water under the beach--that could have achieved the tidal exchange and flushing without the necessity of permanently opening the inlet mouth.) The FEIR responded to these comments by detailing the rationale for selecting the open mouth over buried siphon pipes. The FEIR also briefly summarized the rationale for using an open inlet mouth, rather than evaluating experimental methods, including siphons, Phoenician flushing, installing fluidization and/or crater sink bypass systems, to maintain the desired tidal prism.

Owners argue the FEIR's discussion of the reasons for selecting a permanently open lagoon mouth while rejecting other alternatives for achieving tidal exchanges was so conclusory that it does not satisfy the alternatives analysis requirements of CEQA. The discussion, although brief, was not conclusory. The FEIR listed numerous specific

reasons for rejecting pursuit of the buried siphon pipe option.[56] The FEIR, in summarizing the reasons more experimental methods were alternatives "considered but not carried forward," stated:

> "[T]he Working Group also considered various options for maintaining tidal exchange . . . from the simplest method of [an open inlet maintained through dredging] to experimental methods such as [siphon pipes, Phoenician flushing, installing fluidization and/or crater sink bypass systems, and jetties]. Jetties were rejected for several reasons, the most significant being the Working Group's strong objection to constructing any structures on the beach. The use of siphons, fluidization and more experimental methods were rejected for reasons related to engineering and construction limitations; the potential for retarded tidal flow; increased tidal muting, which would reduce the amount of tidally influenced habitats that could be restored . . . ; significant long-term maintenance issues; potential decreases in the amount of sand that would be delivered to the beach; and possible negative effects on fish. Phoenician flushing was rejected for visual (a water tower is required), safety (related to high velocities during flush events), land use (significant acreage would be required to accommodate the water tower and associated pipes), and economic reasons. Similar options were also studied by Sea Sciences Services in 1980 . . . [whose] report concluded that 'natural tidal flushing is the most environmentally desirable method for achieving adequate rates of circulation.' "

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[56] The FEIR explained that (1) siphons had no history of success in this context; (2) they would have to be buried at such a significant depth that they would frequently become filled with sediment and therefore retard the tidal flow and require significant maintenance; (3) bio-fouling of pipes would also require periodic defouling using methods (chlorinated water or hot water) that would adversely impact biological organisms; (4) the ends of the pipes would require screens which created maintenance problems and would impede fish movement into and out of the basins and would also detract from sediment deliveries to the near beach areas; and (5) pipe flow has higher frictional losses of flow energy, which would cause tidal muting and thereby decrease the amount of tidally influenced habitats that could be achieved.

CEQA contemplates that the selection of the range of reasonable alternatives for detailed analysis in the EIR involves an initial screening process separating potential suitable alternatives (those that are feasible and eliminate significant adverse impacts) from those that are not suitable alternatives. (Guidelines, § 15126.6, subd. (c).) As long as the FEIR "briefly describe[s] the rationale for selecting the alternatives to be discussed" and also "identif[ies] any alternatives . . . considered by the lead agency but . . . rejected as infeasible during the scoping process and *briefly* explain[s] the reasons" for rejecting further consideration of these unsuitable alternatives (*ibid*.) the EIR need not conduct a detailed evaluation of rejected alternatives. (*Id*. at subd (f).)

Owners argue there was inadequate disclosure of the analysis resulting in rejection of detailed consideration of these alternative delivery systems. The FEIR, by including an extended discussion of specifically articulated reasons that buried siphon pipes were deemed unsuitable as well as a summary of the facts leading to the conclusion that other methods were deemed incompatible with the Project goals or were infeasible, amply satisfied the "brief explanation" required by Guidelines, section 15126.6. Although "alternatives and the reasons they were rejected . . . must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public" (*Laurel Heights, supra,* 47 Cal.3d at p. 405), "[t]he need for thorough discussion and analysis is not to be construed unreasonably . . . to serve as an easy way of defeating projects. 'Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned . . . . [¶] When the alternatives have been set forth in this manner, an EIR

does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated.' " (*Id.* at pp. 406-407.) Because there is sufficient detail to inform the public and the decision-makers of the basis for selecting among alternatives, the FEIR is adequate and the trial court correctly rejected Owners' argument that the alternatives analysis was inadequate.

DISPOSITION

The judgment of the trial court is reversed and the matter is remanded to the trial court with directions to vacate its order granting the petition for writ of mandate and to enter a new order denying the petition for writ of mandate. The parties shall bear their own costs in this appeal.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.